Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1178

FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a Partnership,

Petitioner,

v.

EVELYN M. KING, Individually and as President of the Staten Island Branch of the National Association for the Advancement of Colored People, DONALD ASINOBI, Individually and as Treasurer of the Clifton Home Owners Association, CYNTHIA MAILMAN, Individually and as Representative of the Stapleton Civic Association, Inc., LOUIS P. WEIN, Individually and as Chairman of the Clifton Homeowners Association, AMELIA HALL, Individually and as Representative of the Clifton Homeowners Association, HELEN R. POSE, Individually and as President of the Stapleton Civic Association, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAXWELL E. COX
MARC J. ADELSOHN
DAVIS & COX
One State Street Plaza
New York, New York 10004
Attorneys for Petitioner

Dated: January 31, 1980.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons For Granting the Writ	5
Conclusion	12
Appendix "A"—	
Opinion of the District Court	1a
Appendix "B"—	
Judgment	36a
Appendix "C"—	
Notice of Appeal	37a
Appendix "D"—	
Opinion of the Court of Appeals	39a
Appendix "E"—	
Statutory Provisions Involved	42a

Table of Authorities

Cases: PAGE

Bowman Transp., Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, *rehearing denied*, 420 U.S. 956 (1975) 7n

Camp v. *Pitts*, 411 U.S. 138 (1973) 7n
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 7

F.C.C. v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) 7n
F.C.C. v. *Schreiber*, 381 U.S. 279 (1965) 6

Jones v. *Tully*, 378 F. Supp. 286 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 961 (2d Cir. 1975) 11n

Morton v. *Ruiz*, 415 U.S. 199 (1974) 9

Shannon v. *HUD*, 436 F.2d 809 (3d Cir. 1970) 11n
Southeast Chicago Commission v. *HUD*, 343 F. Supp. 69 (N.D. Ill. 1972), *aff'd*, 488 F.2d 1119 (7th Cir. 1973) 11n
Strycker's Bay Neighborhood Council, Inc. v. *Karlen* (79-168 January 7, 1980) 5, 7n, 8

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 6, 7n

Statutes and Rules:

Administrative Procedure Act
§ 706 (42 U.S.C. § 706) 3

Fair Housing Act of 1968
42 U.S.C. § 3601 *et seq.* 3, 6

PAGE

Housing and Community Development Act of 1974
§ 2 (42 U.S.C. § 1437) 3, 6, 10
§ 8 (42 U.S.C. § 1437f) 3, 6

Judiciary and Judicial Procedure
28 U.S.C. § 1254(1) 2

HUD Regulations Chapter VIII—Low Income Housing Site and Neighborhood Standards (24 C.F.R. 3880.112) 3, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a Partnership,

Petitioner,

v.

EVELYN M. KING, Individually and as President of the Staten Island Branch of the National Association for the Advancement of Colored People, DONALD ASINOBI, Individually and as Treasurer of the Clifton Home Owners Association, CYNTHIA MAILMAN, Individually and as Representative of the Stapleton Civic Association, Inc., LOUIS P. WEIN, Individually and as Chairman of the Clifton Homeowners Association, AMELIA HALL, Individually and as Representative of the Clifton Homeowners Association, HELEN R. POSE, Individually and as President of the Stapleton Civic Association, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Faymor Development Co., Inc., a corporation and as General Partner of Tenhill-Faymor Housing Associates, a partnership ("Tenhill"), prays that a writ of certiorari issue to the United States Court of Appeals for the

Second Circuit to review its judgment and decision that affirmed a judgment of the United States District Court for the Eastern District of New York that, *inter alia,* permanently enjoined the United States Development of Housing and Urban Development ("HUD") from providing or reserving federal funds for the construction of a low-income housing project by Tenhill.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, review of which is sought, is not officially reported. It is set forth at App. 39a.[1]

The opinion of the District Court is reported at 464 F. Supp. 827 (App. 1a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is the determination as to whether federal financial assistance should be made available to the developer of a low-income housing project one that should be made on an *ad hoc* basis, or one that should be made according to established guidelines as embodied in HUD procedures and regulations?

2. When HUD, pursuant to its established procedures and regulations and in furtherance of a statutory purpose,

[1] Citations to the Appendix to this petition are in the form "App. .....a."

has determined to make federal financial assistance available to the developer of a low-income apartment house, may a federal court (a) substitute its own judgment for that of HUD, (b) make an *ad hoc* determination, untrammeled by any guidelines, as to whether the project would be inconsistent with HUD's duty to promote integration, and (c) permanently enjoin HUD from providing financial assistance to the developer for the project?

Statutory Provisions Involved

The statutory provisions involved are set forth in the Appendix at page App. 42a. They include the following:

1. United States Code, Title 5, Section 706 (Administrative Procedure Act § 706);
2. United States Code, Title 42, Sections 1437 and 1437(f) (Housing and Community Development Act of 1974, §§ 2, 8);
3. United States Code, Title 42, Section 3601 (Fair Housing Act of 1968);
4. 24 Code of Federal Regulations, § 880.112 (HUD Site and Neighborhood Standards).

Statement of the Case

Pursuant to its established procedures and regulations, HUD approved the granting of federal financial assistance to Tenhill to build and operate a six-story apartment house ("Terrace Gardens") in a racially integrated neighborhood on Staten Island. HUD did so to fill the need for housing that unquestionably existed in the City of New York, and pursuant to its statutory mandate ". . . to assist the several States and their political subdivisions to remedy . . . the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . ." 42 U.S.C. § 1437; App. 43a.

HUD agreed to provide financial assistance in two forms: (a) federal insurance of a privately-financed building loan and first mortgage of $4,369,100 for construction of Terrace Gardens; and (b) payments to Tenhill of the fair market rental of apartments occupied by persons eligible under the Section 8 Rental Assistance Payments Program[2].

Prior to agreeing to grant federal funds for Terrace Gardens, HUD had evaluated the neighborhood surrounding the site in terms of the Site and Neighborhood Standards promulgated by HUD pursuant to its statutory authority[3]. HUD found that the impact of Terrace Gardens upon that neighborhood complied with those Standards. In approving the Terrace Gardens proposal, HUD decided that the proposal was among the best submitted in response to a Notification of Fund Availability issued by HUD and that approval of the Terrace Gardens proposal would advance further the goals of the New York City Housing Assistance Plan, then in effect, which projected a need for 12,000 units of new or rehabilitated housing in the City of New York.

On September 6, 1978, shortly before the scheduled closing of the mortgage commitment and the start of construction, respondents filed a complaint in the United States District Court for the Eastern District of New York, for a preliminary and permanent injunction restraining construction by Tenhill of Terrace Gardens, pursuant to the two agreements between Tenhill and HUD, on the ground that the performance of those agreements by HUD would, *inter alia,* violate the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.,* since it would "tip" the neighborhood into one of minority concentration.

---

[2] 42 U.S.C. § 1437f; App. 43a.

[3] The Standards are set forth in 24 C.F.R. § 880.112; App. 50a.

After a non-jury trial, the District Court held that HUD had acted arbitrarily and capriciously in approving the Terrace Gardens proposal. According to the District Court, instead of following HUD's regulations and established guidelines, *inter alia,* by using the census tract to define the neighborhood and census data to determine its racial composition, HUD should have made an *ad hoc* determination as to what was the neighborhood and whether the project would "tip" the neighborhood into one of minority concentration. Relying principally on the decision of the United States Court of Appeals for the Second Circuit in *Karlen* v. *Harris,* 590 F.2d 39 (2d Cir. 1978) as affording it a wide discretion to review HUD's decision and to make its own *ad hoc* determination as to the Terrace Gardens proposal, the District Court made independent findings, without any basis other than the subjective views of the plaintiffs, both as to the area that would be affected by the Terrace Gardens proposal and as to whether Terrace Gardens would "tip" that area into one of minority concentration. Substituting its own views for those of HUD and without regard to the recognized housing needs of the City of New York, the District Court held that ". . . [a] permanent injunction must issue. HUD's approval of the proposed site for low-income housing is stricken. HUD is permanently enjoined from providing or reserving federal funds for the construction of a low-income housing project at the proposed site." (464 F. Supp. at 845; App. 35a). On appeal the United States Court of Appeals for the Second Circuit affirmed ". . . substantially on the opinion . . . below." (App. 41a).

Reasons for Granting the Writ

The holding of the lower courts represents a startling departure from established standards of, and limitations upon, judicial review of agency action. It is in direct conflict with the principles set forth in the decision of this Court in *Strycker's Bay Neighborhood Council, Inc. v. Karlen* (No.

79-168, January 7, 1980), which summarily reversed the decision of the Second Circuit in *Karlen v. Harris,* 590 F.2d 39 (2d Cir. 1978), upon which the District Court primarily relied in making its *ad hoc* determination here.

The holding of the lower courts, if permitted to stand as a guide in future cases, would place an intolerable burden upon HUD and upon developers. It would thwart the purposes of the Fair Housing Act of 1968 and the Housing and Community Development Act of 1974 by making the construction of necessary housing for low-income families subject to delay or total obstruction on the basis of parochial views and local prejudices.

A

Congress entrusted to HUD the task of assisting the states and local governments in remedying the acute shortage of decent dwellings for families of low incomes. How best to carry out that task in the City of New York, as elsewhere, was a matter committed to HUD, not to the courts. *See generally Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978); *FCC v. Schreiber,* 381 U.S. 279 (1965).

HUD adopted regulations to govern how to go about the task of determining whether a particular project should be granted financial assistance. Here HUD followed its regulations and, after considering the impact of the project on the racial composition of the neighborhood, determined to provide financial assistance for Terrace Gardens.

In reviewing this agency action, the District Court should have limited its role to seeing that HUD had considered the impact of the project on the neighborhood pursuant to its regulations. As this Court has repeatedly held, ". . . the ultimate standard of review [of administrative action] is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*" (Emphasis added).

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).[4]

The District Court, because of the decision of the Second Circuit in *Karlen v. Harris, supra,* interpreted its role quite differently. According to the District Court, not only should HUD have made an *ad hoc* determination, instead of following its regulations, but the court could if it disagreed with the conclusions reached by HUD make its own *ad hoc* determination and permanently enjoin the granting of financial assistance for the project. It was this holding that the Second Circuit affirmed, substantially on the opinion of the District Court, and prior to this Court's summary reversal of *Karlen v. Harris.*

The Second Circuit's *Karlen* decision was announced on December 14, 1978 during the course of the trial before the District Court. On December 22, 1978, the District Judge, referring to the *Karlen* decision, stated in open court:

> As I read it I think it may have some effect on this case before the Court. . . . And the rule set down by the Circuit Court of Appeals may have considerable effect. We may be trying the balance of this matter for nothing. (Tr. 80)

The *Karlen* decision had more than a considerable effect on the outcome of the case below. It was the linchpin of the decision. The District Court repeatedly relied on *Karlen* as affording it wide discretion to review HUD's administrative approval of the Terrace Gardens proposal and to make its own *ad hoc* determination based on the District Court's own perceptions as to the suitability of the proposal.

---

[4] *Accord, Strycker's Bay Neighborhood Council, Inc. v. Karlen, supra; FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974), *rehearing den.,* 420 U.S. 956 (1975); *Camp v. Pitts,* 411 U.S. 138 (1973).

The reliance upon *Karlen* turned out to be misplaced. On January 7, 1980, this Court summarily reversed *Karlen. Strycker's Bay Neighborhood Council, Inc.* v. *Karlen,* (No. 79-168). In so doing, this Court again noted that the role of a reviewing court is not to decide whether the agency decision is one " . . . the judges . . . would have reached had they been members of the decisionmaking unit of the agency." *Id.* at 5, *quoting Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 558 (1978).

In *Karlen,* HUD had considered the impact of a housing project on the environment pursuant to the requirements of the National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*). Here, HUD considered the consequences of the project on the racial composition of the neighborhood as required by the National Fair Housing Act. What the Court found in *Strycker* to be the role of a reviewing court is equally applicable here. Here, as in *Strycker,* once the agency had made its decision, "the only role of the reviewing court was to insure that the agency had considered the . . . consequences" in terms of the National Fair Housing Act; "it [could] not 'interject itself within the area of discretion of the executive as to the choice of action to be taken.' *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410, n. 21 (1976)." (*Id.* at 5).

B

The lower courts held that HUD should have made its determination to grant financial assistance to Tenhill on an *ad hoc* basis. This holding, if permitted to stand, would be an invitation to chaos. Definite procedures and standards are particularly important in an area as sensitive as site selection for federally assisted low-income housing.

Moreover, the *ad hoc* approach to the administrative process is one that this Court has frequently condemned.

For example, in *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974), the Court held:

> No matter how rational or consistent with congressional intent a particular decision might be, the determination . . . cannot be made on an *ad hoc* basis by the dispenser of the funds.
>
> The Administrative Procedure Act was adopted to provide, *inter alia,* that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.

In the present case, HUD, acting pursuant to its statutory authority and in accordance with the requirements of the Administrative Procedure Act, had promulgated and published Site and Neighborhood Standards for proposals under the Section 8 Rental Assistance Payments Program. These standards served as guidelines to HUD officials in evaluating proposals and as notice to developers, such as petitioner, of the requirements which would have to be met in order to obtain federal funding.

Pursuant to established policy and procedures, HUD used the United States census tract in which the Terrace Gardens site was located as the data source area for evaluation of the proposal and relied upon the most recent available census figures to determine the composition of the area. HUD's approach was logical—census statistics are the most consistently correct and readily available demographic data. Nevertheless, the District Court held that the use of the census tract data was arbitrary and capricious in this case, because that was not the way it would have gone about evaluating the proposal. According to the District Court, the evaluation had to be made on an *ad hoc* basis.

This holding, if permitted to stand, will obstruct the construction of vitally needed housing for low-income fami-

lies by placing unnecessary and possibly insurmountable barriers in the path of HUD and developers.

Under the lower courts' *ad hoc* approach to evaluating proposed projects, instead of using census tracts as the data source area for proposed sites, HUD must define the neighborhood on the basis of unspecified and variable criteria. Then, although no official census data will be available for the newly defined neighborhood, HUD must somehow determine the demographic composition of the neighborhood.

If every grant of funds for low-income housing projects must be based on an *ad hoc* definition of neighborhood made under non-disclosed, variable and subjective criteria, then every grant of funds will be subject to challenge on a possibly credible claim that HUD acted arbitrarily and capriciously. If reviewing courts are free to apply their own *ad hoc* definitions in lieu of those applied by HUD, then the possibility of construction delays due to litigation will be greatly increased. If HUD must conduct a mini census each time it contemplates a grant of funds to assist low-income housing, then its administrative function will be severely impaired. If developers such as petitioner cannot know with reasonable certainty what requirements must be met to qualify for federal assistance, then the risks involved in private participation in low-income housing will become economically unacceptable. If the decision below is permitted to stand, then all the other "if's" will become a reality and the inescapable result will be a perpetuation of what Congress has recognized as an ". . . acute shortage of decent, safe, and sanitary dwellings for families of low income . . . ." 42 U.S.C. § 1437; App. 43a.

C

Not only did the District Court improperly exceed the limits of judicial review by setting down its *ad hoc* evaluation rule; it further usurped HUD statutory role by proceeding to make its own *ad hoc* evaluation of the Terrace Gardens proposal. If an *ad hoc* determination was required, then it should have been made by HUD acting pursuant to its expertise in the housing area. Judicial meddling, no matter how well-intentioned, has no place in the administrative process.

By granting a permanent injunction, the District Court foreclosed consideration by HUD of other relevant factors which would have required the approval of the Terrace Gardens proposal even if an *ad hoc* evaluation showed that the area surrounding the Terrace Garden site was an area of minority concentration. The regulations promulgated by HUD permit the location of Section 8 housing in an area of minority concentrations where ". . . (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area." 24 C.F.R. § 880.112(c)(1); App 50a. Had HUD been afforded the opportunity, it might well have concluded that, given the desperate needs of New York City for decent low-income housing, the Terrace Gardens proposal should go forward.[5]

---

[5] In other cases "[t]he necessity to rehabilitate a blighted neighborhood and to provide additional low-income housing at a particular site may clearly outweigh the disadvantages of racial concentration" and that ". . . low income housing and racial concentration at a particular site are not mutually exclusive if justified by the relevant housing factors." *Jones* v. *Tully*, 378 F. Supp. 286, 293 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 961 (2d Cir. 1975). *Accord*, *Shannon* v. *HUD*, 436 F.2d 809, 822 (3d Cir. 1970); *Southeast Chicago Commission* v. *HUD*, 343 F. Supp. 62 (N.D. Ill. 1972), *aff'd*, 488 F.2d 1119 (7th Cir. 1973).

In its rush to apply its own *ad hoc* theories to the case before it, the District Court did not see fit to allow HUD to discharge its statutory duties by re-examining the Terrace Gardens proposal under the alternatives that are set forth in HUD's regulations. In affirming the District Court, substantially on the opinion below, the Second Circuit has invited other District Courts to do the same.

Conclusion

For the reasons stated, the writ should be granted and the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

MAXWELL E. COX
MARC J. ADELSOHN
DAVIS & COX
One State Street Plaza
New York, New York 10004
Attorneys for Petitioner

APPENDIX

APPENDIX "A"

(Opinion of the District Court)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 78 C 1967

EVELYN M. KING, Individually and as President of the Staten Island Branch of the National Association for the Advancement of Colored People, DONALD ASINOBI, Individually and as Treasurer of the Clifton Home Owners Association, CYNTHIA MAILMAN, Individually and as Representative of the Stapleton Civic Association, Inc., LOUIS P. WEIN, Individually and as Chairman of the Clifton Homeowners Association, AMELIA HALL, Individually and as Representative of the Clifton Homeowners Association, HELEN R. POSE, Individually and as President of the Stapleton Civic Association, Inc.,

Plaintiffs,

v.

PATRICIA HARRIS, Secretary of the United States Department of Housing and Urban Development, FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a Partnership,

Defendants.

February 8, 1979

Hall & Thompson by John S. Wellekens,
Staten Island, N. Y., for plaintiffs.

Edward R. Korman, U. S. Atty., Brooklyn, N. Y.,
by Homer C. LaRue, Asst. U.S. Atty., for Patricia Harris.

Davis & Cox, New York City,
by Marc Adelsohn, Brooklyn, N. Y.,
for Faymor Development.

Appendix "A"

COSTANTINO, D.J.

This is an action brought by neighborhood residents and community organizations seeking to preserve a racially integrated neighborhood on Staten Island. In this case, a racially mixed and balanced community is attempting to prevent not only the undue concentration and segregation of minorities in the area, but also the ultimate destruction of the community. *See Otero* v. *New York City Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973). It is the first time, to this court's knowledge, that the National Association for the Advancement of Colored People ("NAACP") has sought legal action to *oppose* the development of low-income housing designed to aid minority groups.[1] *Compare Jones* v. *Tully*, 378 F.Supp. 286 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 961 (2d Cir. 1975).

The plaintiffs are individuals living near a proposed housing project and community and homeowner associations which represent the interests of area residents. They seek to enjoin the use of federal funds for the construction of a low-income highrise[2] apartment building. They allege that the development will further the creation of an area of minority concentration and upset the delicate racial balance which presently exists.[3]

Defendants are Patricia Harris, Secretary of the Department of Housing and Urban Development (HUD), and the

[1] The Section 8 housing assistance program, 42 U.S.C. 1437(f) is designed to aid minority as well as low income families. *See* 42 U.S.C. 1437(f); 24 C.F.R. 880.101 *et seq.;* Fed. Reg. 4296 (Jan. 24, 1977).

[2] Even a six-story housing project represents a major development in terms of Staten Island. Due to the generally low density nature of Staten Island housing. Thus, the "high-rise" nomenclature is used to reflect that condition.

[3] *See infra.*

Appendix "A"

developers of the proposed complex. The jurisdiction of this court is based on the Thirteenth and Fourteenth Amendments to the United States Constitution, the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*, the National Environmental Policy Act of 1969, 42 U.S.C. §4321, *et seq.*, and 28 U.S.C. 1343.[4] Plaintiffs ("homeowners" or "area residents") sue as a class comprised of all New York State residents who live near the proposed development.[5] Initially, the plaintiffs sought a preliminary injunction. During the hearing on the preliminary injunction, the court found a sufficient basis to proceed to a trial on the merits. Fed. R. Civ. P. 65.[6] The court must now determine whether to issue a permanent injunction.

FINDINGS OF FACT

A. *The Proposal*

The proposal in issue involves federally funded low-income housing. On June 3, 1977 HUD published a Notifica-

[4] Plaintiffs also rely upon the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* as a basis of jurisdiction. However, that Act is not an independent basis of subject matter jurisdiction in this court. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

[5] Plaintiffs seek to proceed by way of a class action. Since the prospective benefits of the injunction will inure to the benefit of all members of the proposed class, class certification is unnecessary. *Davis* v. *Smith*, 431 F.Supp. 1206 (S.D.N.Y. 1977), *aff'd*, No. 77-7541 (2d Cir. Aug. 15, 1978); *McGraw* v. *Berger*, 410 F.Supp. 1042 (S.D.N.Y. 1976), *aff'd*, 537 F.2d 719 (2d Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977).

[6] The developers had moved during the hearing on the preliminary injunction for a bond in the amount of $1,500,000. As a result of the court's decision on the permanent injunction, that issue need not be reached. However, even if the bonding issue was before the court at this time, the court would be reluctant to grant the developer's request since the bonding requirement would effectively foreclose the prosecution of this action by plaintiffs.

tion of Fund Availability ("NOFA") for 1,000 family dwelling units to be funded under the Section 8 Housing Assistance Payments Program ("§8").[7] On June 22, 1977 the developer, in response to the NOFA, submitted a preliminary proposal for the construction of new §8 low-income housing.[8] The proposed development was a 96-unit six-story apartment house to be located at the corner of Hill Street and Tompkins Avenue on Staten Island ("Tenhill").

On August 10, 1977 HUD informed the developer that the preliminary proposal was approved and that $719,568 in federal funds was reserved for the project. HUD directed the developer to furnish information for the final proposal. HUD also notified the local New York City authorities, requesting objections to the proposal. Apparently, no objections were filed. On July 6, 1978 HUD approved the final proposal for low-income housing.

HUD had previously reviewed a proposal submitted by the developer for housing for the elderly at the same site. That proposal was disapproved by both the Equal Opportunity (EO) and Housing Management ("HM") Divisions of HUD.[9] The EO specialist indicated a likelihood of increased minority population in census tract 29 discussed *infra*, not indicated by the 1970 census data. He found that the complex would create an undue concentration of subsidized housing in the area. The HM analysts had similar objections. They recommended a housing survey to ascertain the need for additional housing in the area because several projects in the vicinity were having difficulty renting their units. John O'Rourke, an HM analyst, indicated in his supplemental report that the proposed project would adversely affect the other subsidized housing. He indicated a generally questionable and unsavory neighborhood with a high occurrence of muggings and drug use. He indicated that he feared for the safety of the elderly and believed the site very inappropriate for any housing.

[7] 42 U.S.C. §1437(f).

[8] The nature of the §8 housing plan is set forth in 42 U.S.C. §1437(f). The statute makes federal funds available for the construction of subsidized housing. The statute authorizes assistance payments to owners who agree to construct housing designed to aid low income families. To that end, the statute sets limits on the maximum rental charge for a housing unit. It requires, however, that 30% of the assisted units be made available to very low income families whose incomes do not exceed 50% of the median income for the area. Based on 1970 census figures, census tract 29, discussed *infra*, had a median income of $8,987. That figure was $600 above 80% of the median income standard for low income families.

[9] Plaintiffs' Exhibit 29 concerning a proposal for elderly housing at the proposed site is now in evidence. Its relevance is established by Plaintiffs Exhibits 16-6 and 25, in evidence, and by HUD's subsequent approval of Tenhill.

The various HUD branches[10] also considered the preliminary and final proposal for low income housing. All but the Economic and Market Analysis Division ("EMAD") found the preliminary proposal to be acceptable. The EMAD, however, disapproved the proposal because the site was impacted with subsidized housing.[11] The analysis also indicated that the 1970 census data did not reflect the current condition of the neighborhood. However, HUD decided to approve the final proposal on the basis of the recommendations of its other branches, and filed its report. HUD's technical checklist on that report indicated that the preliminary proposal was approved by only four of its six branches. The HM and EMAD recommendations were not listed. The report indicated, however, that the proposal was approved on the basis of *all reviews.*

[10] The HUD branches reviewing the housing proposals are six in number. They are the valuation, architectural, Equal Opportunity, Housing Management, Multifamily Housing, and Economic and Market Analysis Branches of HUD.

[11] The EMAD did not review the elderly housing proposal.

Appendix "A"

The final HUD report on the proposal was submitted after the institution of this action. This court had remanded the matter to HUD to reconsider the site proposal and to review the EMAD report. An EO specialist, Eli Forman, prepared the final report. His report and findings were limited to census tract 29. His conclusions concerning the racial composition of the census tract were based mainly upon the 1970 census data. Nevertheless, he found a high percentage of minorities in the Stapleton Houses project, which is a public housing project in census tract 29 adjacent to the proposed site. He indicated that the only updated material available showed a dramatic increase in the number of minorities in the housing project. He found a need to de-escalate the racially sensitive housing market in the census tract, and recommended a public relations program to overcome the high crime stigma of the neighborhood. The proposal was reapproved by HUD over any previously filed divisional objection and the matter was brought before the court for a hearing on the preliminary injunction.

B. *The Area*

Tenhill is located in census tract 29 ("Tract"). Tract 29 is an area encompassing parts of the Stapleton-Concord section of Staten Island. Its designated boundaries are Tompkins Avenue to the East, Vanderbilt Avenue to the South, Broad Street to the North, and Van Duzer Street to the West. Tenhill is approximately 300 feet from Vanderbilt Avenue and is adjacent to Tompkins Avenue. Tompkins Avenue is the boundary between Tracts 29 and 27.[12] Van-

[12] Most of the land area of census tract 27 is occupied by the United States Public Health Service Hospital.

Appendix "A"

derbilt Avenue is the dividing line between Tracts 29 and 40.[13]

HUD considered Tract 29 to be the relevant area for estimating the total minority concentration. HUD relied exclusively upon the census data compiled in 1970 for Tract 29 in making that determination. In 1970 that data indicated a total population of 4,623 in Tract 29. There were 4,000 white persons and 623 minority persons. Thus in 1970 the minority population for Tract 29 was approximately 12.8% of the total population. HUD considered the census data to be accurate, even though it recognized that the 1970 census data was outdated. The evidence supports the conclusion that because the 1970 census data was clearly outdated it was an insufficient indicator of minority and low-income concentration in the area.

The technical boundaries of Tract 29 do not represent the relevant neighborhood for any consideration of minority or low-income population. The evidence at trial indicates the difficulty with confining the neighborhood to Tract 29. Based on the testimony of area residents, the proximity of the housing complexes in Tracts 29 and 40, and the natural and man-made boundaries in the area, the court finds that the relevant neighborhood extends beyond the imaginary boundaries of Tract 29. The relevant community includes Tract 27 and parts of Tracts 29 and 40. It extends along Canal and Water Streets in Tract 27, Broad Street in Tract 29 up to Targee Street. Targee Street is the western boundary from Broad Street to Mary Street in Tract 40. The railroad track which represents the southeastern border of Tract 40 is the outer boundary of the community. That boundary extends to Bay Street.

[13] Tract 40 contains a large area of vacant land along its southeastern border.

Appendix "A"

The eastern boundary is Bay Street from Greenfield Avenue to Water Street.[14] The center of this community is concentrated with high rise apartment complexes in the immediate vicinity of Tenhill. This core of the neighborhood shows an excessive concentration of a low-income, minority population.[15]

---

[14] This neighborhood coincides with the boundaries given by Evelyn King at trial. The two significant land areas noted in footnotes 12 and 13 *supra* may be discounted from the total neighborhood.

Defendants claimed that residents of Tract 40 lacked standing to contest HUD's action. Since the court has found that the tract 40 residents represented in this litigation are part of the relevant neighborhood, those residents have standing to sue. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Even if the tract 40 residents were outside the scope of the relevant community of HUD's determination, they nevertheless would have a sufficient stake in the outcome of the controversy because of the potentially disruptive effect of Tenhill on their community. *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970).

[15] The available data for Tract 29 demonstrates the high concentration of minority families in the Tenhill area. The tax assessment tables indicate few new housing construction projects in Tract 29 since 1970. Thus the court finds that the population in Tract 29 remained substantially constant at 4,600. The 1970 statistics showed a minority population of 13% or 598 people. Block 101, which is comprised wholly of Stapleton Houses, had 486 minority persons. The remainder of Tract 29 had 112 minority persons. In 1977 Stapleton Houses had a total population of 2,600 and a minority population of 65.9% or 1,713 people. In 1978 Stapleton Houses had a population of 2,538 with a minority population of 74.9% or 1,900 persons. Thus, even if the remaining population in Tract 29 had a constant minority population of 112, there would be approximately 2,012 minority persons in Tract 29 in 1978. This accounts for a minority population percentage of 43.7% in Tract 29.

The same computations may be done for the Tract 40 population. In 1970 Tract 40 had a total population of 5,935 with minority population of 18%, or 1,068 persons. The statistics for four housing complexes alone indicate the dramatic increase in the minority population in Tract 40. Of 824 persons in Fox Hills, 99%, or 816 persons, were minority. Of 221 persons at Seaview Arms, 95%, or 210, were minority. Of 699 persons at St. George Plaza, 91%, or

Appendix "A"

The community contains mostly low density one and two family dwelling units. In the context of Staten Island housing, and this neighborhood, a six story apartment complex represents a dominant feature in the community. Undoubtedly Tenhill, if constructed, will have a significant impact on the community.

Tract 29 is dominated by the Stapleton Houses Project. Stapleton Houses is a 693 unit public housing development. Its physical plant extends over a large segment of the land area of Tract 29. It has a population of more than 2,500 people, more than half of the 1970 census tract population. Stapleton Houses is situated across the street from Tenhill and is within 100 feet of the proposed site. In 1970 80.7% of the units were occupied by whites. By 1977 that figure had decreased to 34.1% and by 1978 whites occupied 25.1% of the units. In 1970 only 36 families were receiving public assistance and only 63 families were headed by a single parent. In 1977 these figures were 243 and 280 respectively, and by 1978 there were 285 and 317 such families respectively. In 1972 the project had a crime rate of 5.6% per 1,000 population. In 1977 that figure had changed to 25.2%, the highest of all public housing projects on Staten Island.

Stapleton Houses and five other complexes in Tract 40 are the center of the neighborhood. That these complexes represent part of one neighborhood is evidenced by the distance between the projects; the community attitudes about the projects; the similar nature of the housing and

---

636, were minority. Of 2,036 persons at Park Hill, 99%, or 2,015, were minority. Thus, in these four complexes alone, there was a total population in 1978 of approximately 5,935 with 3,677 minority persons, or 61.9% of the total. Thus, the census tracts were minority concentrated in 1978.

its contrast to the low density housing in the area; the accessibility to each complex from any other; the proximity of shopping centers; recreation centers, houses of religious worship and schools; and the racial and economic composition of the complexes. In combination they represent a dominant aspect of the neighborhood.

This series of high-rise dwelling complexes is in the immediate vicinity of Stapleton Houses and Tenhill. They lie along the Vanderbilt Avenue border of Tracts 29 and 40. They are between 1500 feet[16] and 3200 feet[17] from Tenhill. HUD did not consider the impact of these complexes in reaching its decision to approve Tenhill and did not investigate the minority concentration in them because HUD considered only those complexes within the boundaries of Tract 29 to be relevant. The court finds that these complexes are a significant aspect of the community and should be viewed as part of the relevant neighborhood.

The relevance of these complexes is apparent from their proximity to Tenhill and their statistical prominence. The Park Hill apartments is an 806 unit complex approximately 2,000 feet from the proposed site. As of June 1977, of 749 units occupied, only 5 were occupied by whites. Minorities occupied the remaining 744 units and there were 50 vacancies. There has been a consistently high pattern of turnovers each year. The statistics demonstrate a dramatic increase in the number of minority families since 1970. In 1970 401 of 800 units were occupied by whites. By 1977, of 749 units occupied, only 5 were occupied by whites. Moreover, 701 of 749 units were under the §8 Housing Assis-

[16] Calculated as follows: South 300 feet to Vanderbilt Avenue, and West 1,200 feet along Vanderbilt.

[17] Calculated as follows: South 300 feet to Vanderbilt Avenue, and West 2,900 feet along Vanderbilt.

tance Plan, including the 5 white units. Thus, by 1977 the minority population had doubled to 99% of the total unit population.

The Fox Hills complex is approximately 1,500 feet from Tenhill. The minority population is 99% of the 360 residential units occupied. The vacancy rate was constantly between 6% and 10% of the available units. Moreover, of 291 individuals receiving income, 125 were on welfare and 25 were unemployed. The St. George Plaza complex consists of 305 units with a 9% white population for 1978. The Seaview Arms has 84 units with a white population of 5%.[18] Thus, with due consideration for the nature of Staten Island housing and demographics, these complexes are a dominant feature in the area.

The remainder of Tract 29 is a mixture of vacant lots, operating or abandoned business facilities, and one or two family houses. The apartment complexes overshadow the low density housing. No statistics were presented by HUD concerning the racial composition of the residents in these houses. No survey was conducted to ascertain the racial mixture in the houses before approving Tenhill. However, the evidence indicates that the housing around the complexes in Tract 29 is racially mixed.[19] The New York City

[18] Statistics for another complex, the Concord, were not available. Defendants ask the court to consider two other developments known as the Terrace Gardens in combination with the other five complexes in Tract 40. The court finds that those projects are in a different neighborhood not reflective of the neighborhood surrounding Tenhill. However, the court will note that those complexes presently have a delicate racial balance with a population of approximately 60% white and 40% minority.

[19] Indeed, plaintiff Evelyn King is a black resident of the area. The NAACP chapter records indicate that 29 members live in Tract 29. Moreover, the 1970 census data indicated that blacks resided in the low density housing in the surrounding area.

tax records indicate a relatively stable low-income community with an average assessed housing valuation between $3,000 and $8,000, with a large concentration in the $4,000 to $5,000 range.

The main business district in Tract 29 has deteriorated significantly during the period from 1970 to the present. Numerous businesses, including two supermarkets and a bank branch, have closed not only because of the rising criminal activity in the area, but also because of the inability of the large low-income population to generate sufficient capital to support business enterprises. A supermarket adjacent to Tenhill has remained closed since December 1975. It and other abandoned buildings evidence the continuing urban blight in the area.

A significant cause of the deterioration is the increased criminal activity in the neighborhood. Tenhill is located in the 120th precinct. Most of the criminal activity in the 120th precinct centers around the Stapleton Houses and Fox Hill complexes. In 1970 the 120th precinct ranked 24th of 73 precincts in New York City in terms of felony complaints. The precinct is divided into 22 sectors. The Stapleton and Fox Hill apartment complexes are located in sectors C and E respectively. These two sectors extend into Tracts 29 and 40. From 1970 to 1977 the precinct experienced a total crime increase of 60.6%. The Stapleton-sector C area consistently ranked first or second of the 22 sectors in terms of criminal activity. The Park Hill-sector E area ranked 9th of 22 in 1970 and has grown progressively worse. It ranked 2nd of 22 in 1974 to 1977, and 3rd of 22 in 1978. The Stapleton sector experienced a 72.8% increase in crime from 1970 to 1977. The Park Hill sector experienced a 161.6% crime increase during that period. Thus the proposed site is centered between the areas of

highest criminal activity on Staten Island. Moreover, while crime has risen, the city's financial crises have forced cutbacks in the police work force for the area,[20] raising the likelihood of sustained criminal activity in the area.

The statistics produced by the New York City Fire Department indicated a strained delivery system. While the fire companies servicing the area rank in the bottom half of all city fire companies in terms of activity, they are very active in terms of the Staten Island community. While manpower has decreased, there have been a great number of fires and false alarms in the area. Significantly, the companies serve a relatively small area of Staten Island. However, because of the number of runs made, the companies ranked 1st and 5th in terms of activity of the 16 fire units on Staten Island in 1977.

The public schools servicing the area near Tenhill are presently minority and low-income concentrated. Public School (P.S.) 14 is approximately 25 feet from Tenhill. In 1974 it had a minority population of 44%. This steadily increased to 73% in 1978. The school is 98% utilized at present. Moreover, 84% of the children at P.S. 14 are eligible for the free lunch program, which indicates their low-income background. The school ranked 38 of 39 on Staten Island in terms of reading level achievement.

Similarly, the minority attendance at Junior High School (J.H.S.) 49 increased from 28% in 1974 to 51% in 1978. This influx of minorities into the schools reflects the general

---

[20] In 1978, New York City attempted to alleviate the hardship caused by the first massive cutbacks in police manpower. Sixteen additional officers were assigned to the 120th precinct. Twelve were assigned to the Stapleton-Sector C area and two of the Park Hill-Sector E area. This further evidences the undesirability of the area for new low-income housing, and supports the initial HM analysis of the area.

influx of minorities into the area. The other neighborhoods or housing projects which contribute students to J.H.S. 49 are predominantly white and would not account for the increased minority attendance. J.H.S. 49 is 85% utilized. It is within 500 feet of the proposed site. Two other schools, P.S. 13 and P.S. 57[21] also service the neighborhood residents. It was unlikely, however, that children from Tenhill would attend either school.[22] Thus, younger children from Tenhill would attend either J.H.S. 49 or P.S. 14.

The evidence established that over the years the area has experienced rapid deterioration. Area residents believe the community is presently racially balanced, but attribute the dramatic deterioration to the apartment complexes in the area. It is clear that an increase in low-income housing units will create an intolerable situation for both black and white neighborhood residents. The creation of Tenhill will insure the ghettoization of the area. While the court does not use that phraseology lightly, it finds that its use here is appropriate. The neighborhood surrounding the proposed building site has deteriorated into a Staten Island ghetto with an undue concentration of low-income, minority residents.

Tenhill will not be attractive to middle-income white or black families. The area is in a state of deterioration with no signs of revitalization. The area's black and white community stands ready to abandon the area if Tenhill is built. Moreover, the area is already concentrated with high-rise dwelling units with undue concentrations of low-income, minority families.

---

[21] P.S. 57 lies near the Park Hill complex. Students were shifted from P.S. 57 to P.S. 13 in another neighborhood in order *to integrate* P.S. 13.

[22] The area is also served by three Catholic schools and one Hebrew school.

Tenhill will not provide a balanced tenancy. It is a §8 project. Therefore, at least 30% of its population must be in the *very low* income range. Even if the builder is the best in his business, it is doubtful that he could make the remaining 70% of the apartment complex appealing to middle class whites or blacks. The facts establish a correlation between low-income families and minority families. The other §8 projects have attracted mostly minority residents. For example, the Park Hill statistics indicated that 701 of 749 §8 units were occupied by minority families. The Seaview Arms complex indicated that 182 of 221 persons were under §8 assistance in an apartment complex with a 95% minority population. Thus, Tenhill will be populated by low-income families with a high correlation of minorities.

Moreover, an additional low income housing project is not needed in the community. It will not alleviate the low-income housing shortage in New York City. Tenhill will provide 96 more units in an area concentrated with apartment complexes which have a high turnover rate and a high vacancy rate. For example, in June 1977, when this project was initially proposed, Stapleton Houses had a 121% turnover rate. Park Hill had 50 vacant units, and 389 of 749 units were turned over during the year. Fox Hill had 35 vacant units. Seaview Arms and St. George Plaza had 11 vacancies. Thus, there were 96 vacant units in June, 1977 in only four of the six relevant apartment complexes.[23] Therefore, no urgency for low-income housing existed in the area at the time of HUD's approval. That condition has persisted to the present.

---

[23] Statistics showing the actual vacancies at the Concord and Stapleton Houses complexes were not available. However, because of the high turnover rate at Stapleton it is more than likely that some vacancies existed there as well.

Appendix "A"

CONCLUSIONS OF LAW

I. REVIEW OF AGENCY ACTION

Plaintiffs seek to set aside HUD's approval of Tenhill on numerous grounds. The parties agree that the proper standard for judicial review in this case is found in Section 706(2) (A) of the Administrative Procedure Act, 5 U.S.C. §706(2) (A). The standard was set forth in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971):

> The court is first required to decide whether the Secretary acted within the scope of his authority. *Schilling* v. *Rogers,* 363 U.S. 66, 676-677 (1960). This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion . . . Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2) (A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. (citations omitted) Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. *Id.* at 415-16.

Accord Schicke v. *Romney,* 474 F.2d 309 (2d Cir. 1973). Thus §706 precludes judicial *de novo* review or a review based on the "substantial evidence" standard.

Appendix "A"

Plaintiffs contend that under this standard, HUD's approval of Tenhill was arbitrary and capricious and violated HUD's duty to integrate the neighborhood. The court finds that HUD's action was arbitrary and capricious and did not comply with its legal obligations in several ways.

II. HUD'S DUTY TO INTEGRATE

Any review of Tenhill must focus on HUD's authority. It is now well settled that HUD has an affirmative duty to promote racial integration through its housing policy. *Karlen* v. *Harris,* No. 78-7147 (2d Cir. Dec. 14, 1978); *Shannon* v. *HUD,* 436 F.2d 809 (3d Cir. 1970); *Trinity Episcopal School Corp.* v. *Romney,* 387 F.Supp. 1044 (S.D.N.Y. 1974), *aff'd,* 523 F.2d 88 (2d Cir. 1975). *See also Otero* v. *New York City Housing Auth.,* 484 F.2d 1122 (2d Cir. 1973). This duty is mandated by the stated policies of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.,*[24] the Housing and Development Act of 1974, 42 U.S.C. §5301, *et seq.,*[25] the Section 8 Housing Assistance Payments Pro-

---

[24] 42 U.S.C. §3601 provides that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601(d) (5) requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."

[25] 42 U.S.C. §5301(c) (6) provides:

> (c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives—
>
> (6) the reduction of the isolation of income groups within communities and geographical areas and the promotion

gram, 42 U.S.C. §1437(f), and by the National Environmental Policy Act of 1969, 42 U.S.C. §4321, *et seq.*[26] Either separately or in combination these acts place a heavy burden on HUD to further national housing policy by avoiding the concentration of minority or low-income families in the same community. *See Karlen* v. *Harris, supra. See also Otero* v. *New York City Housing Auth., supra.* As noted by the court in *Otero:*

> We do not view that duty [to integrate] as a "one-way street" limited to introduction of non-white persons into a predominantly white community. The Authority is obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons. *Id.* at 1125. An Authority may not, for instance, select sites for projects which will be occupied by non-whites only in *areas* already heavily concentrated with a high proportion of non-whites. . . . *Not only may such practices be enjoined, but affirmative action to erase the effects of past discrimination and desegregate housing patterns may be ordered. Id.* at 1133 (emphasis added).

Thus, HUD must affirmatively seek to provide housing in areas that will further these goals and avoid the continued and unnecessary area concentration of low-income and minority families. To this end, site selection has surfaced as the major vehicle for insuring that the purposes of the Acts

---

> of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.

[26] *See Karlen* v. *Harris, supra.*

are accomplished. *See Karlen* v. *Harris, supra; Otero* v. *New York City Housing Auth., supra.*

HUD's site and neighborhood standards substantially comply with the policies of the Acts. HUD's site selection standards are set forth in 24 C.F.R. 880.112. That section provides in relevant part:

> Proposed sites for new construction projects must be approved by HUD as meeting the following standards:
>
> (b) The site and neighborhood shall be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued pursuant thereto.
>
> (c) *The site shall not be located in:*
>
> (1) *An area of minority concentration* unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable.)
>
> (2) *A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.*

Appendix "A"

(d) *The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.* (emphasis added) [27]

[27] Similarly, HUD's proposed rule on site selection, 24 C.F.R. 200.704, in 42 Fed. Reg. 4296 (Jan. 24, 1977), provides:

(a) Determination of minority concentration or racial mixture. In furtherance of the objectives of the statutes and the Executive Order enumerated in this section, HUD shall determine:

(1) Whether the site is in an area of minority concentration. In making such determination, the area to be considered shall be the census tract in which the site is located *or such other area for which reliable data as to racial composition is available* and which HUD determines, on the basis of functional considerations (i.e., location of neighborhood facilities such as schools, shopping centers, churches, etc.) to be more appropriate. *An area shall be determined to be an area of minority concentration if minority residents constitute (i) more than 40 percent of the residents of the area than the proportion of minority residents of the locality as a whole.*

(2) Whether the site is in a racially mixed area. An area, as determined pursuant to paragraph (a) (1) of this section shall be determined to be a racially mixed area if it contains both minority and non-minority residents and minority residents constitute a significant percent but less than 40 percent of the total residents of the area.

(3) Whether a site is in area of undue concentration of federally-assisted housing . . .

(b) Unacceptability if ratio of minority residents of minority residents would be increased significantly. A site in a racially mixed area shall not be approved if the proposed project would result in a significant and rapid increase in the proportion of minority to non-minority residents in the area causing it to become an area of minority concentration in which minority residents would constitute more than 40 percent of the residents of the area.

(c) Unacceptability due to disproportionate concentration of minority students in public schools. A site in a racially mixed area or area of minority concentration shall not be approved if the proposed project would distort a voluntary or court-imposed plan adopted by the school system or locality to assure equality of educational opportunity in its public schools, by causing a significant and disproportionate concentration of the locality's minority students in one or more of the public schools serving the site.

(d) Approval of site in an area of minority concentration. A site located in an area of minority concentration may be approved if one of the following determinations is made:

(1) Sufficient and comparable opportunities for assisted housing are available outside areas of minority concentration . . . or

(2) There are no sites which are available or which feasibly can be made available for housing constructed or rehabilitated under the statutory provisions cited in Par. (a) (3) within the jurisdiction of the unit of general local government in areas which are not areas of minority concentration . . . or

(3) The site is an integral part of an overall local strategy for the preservation or revitalization of the immediate neighborhood.

• • •

(e) Approval of site likely to improve quality of area. (emphasis added)

See also Statements of Policy in Notice of Proposed Rule Making, 42 Fed. Reg. 4296-4298 (Jan. 24, 1977).

Appendix "A"

Thus, HUD has recognized its continuing duty to prevent the creation of concentrated *areas* of low-income and minority persons. HUD's rules require it to scrutinize both an area of racial concentration containing a minority population of 30% to 40% of the total population and an area of low-income concentration without regard to minority population. In delineating the relevant area of racial or low-income concentration, HUD analysts are not required to look to any *particular* area with definite pre-determined boundaries. Nor, in light of the national housing policies contained in the various housing Acts, could it properly limit the scope of its inquiry to any one area where that would distort HUD's determination. *See Karlen* v. *Harris*,

supra; Trinity Episcopal School Corp. v. *Romney, supra; Otero* v. *New York City Housing Auth., supra; Shannon* v. *HUD, supra.* With this duty in mind, the court finds that HUD's approval of Tenhill was arbitrary and capricious.

A. *Reliance on Census Tract 29*

HUD considered the relevant "area" of inquiry to be only Tract 29. HUD's analysts indicated that the use of the census tract was the most reliable and convenient method for ascertaining the racial or economic composition of an area in the context of its rules and the Acts. The court finds that reliance on census tract boundaries *in vacuo* in order to delineate a relevant area of minority or low-income concentration was arbitrary and capricious and in violation of HUD's statutory duty to integrate. Delineating neighborhood boundaries requires a detailed examination of numerous objective and subjective factors. Initially, the problem was brought into focus by the racial imbalance existing in the nation's schools. The school desegregation cases demonstrate the perplexing conceptual barriers to an accurate determination and the difficulty with providing an adequate remedy in each case. Those cases indicate the necessity for an *ad hoc* determination in order to achieve a satisfactory resolution. *See, e.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), *rehearing denied*, 403 U.S. 918 (1971); *Green* v. *County School Bd.*, 391 U.S. 430 (1968). *See also* Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965).

In recent years the focus has shifted to housing patterns as the underlying cause of segregation. *See Karlen* v. *Harris, supra; Otero* v. *New York City Housing Auth.,*

supra; Shannon v. *HUD, supra.* Those cases indicate the problems which confront any housing proposal in a community. To accommodate the peculiar patterns of urban neighborhoods, any approach to a definition of neighborhood requires imagination, innovation, and flexibility. Such an approach can best assure integration. Since each neighborhood is uniquely affected by community perceptions, any neighborhood analysis must be made on an *ad hoc* basis. In general, a neighborhood represents any section of a region or city, having indefinite boundaries, and which is drawn together by the shared perceptions of its residents as to what constitutes their neighborhood, by the facilities generally available for their use, by their social and economic status, and by natural or man made physical boundaries.

The court finds that imaginary census tract boundaries *alone* reflect neither a community's perception of itself nor the social cohesiveness of a given area. While census tracts may provide HUD with a general indication of residential patterns, they are inadequate as the sole indicators of the racial or economic composition of housing in a neighborhood. Other courts have not hesistated to ignore imaginary or even physical boundaries where those boundaries hinder the affirmative obligation of government authorities to integrate. *See Gautreaux* v. *City of Chicago*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *Resident Advisory Bd.* v. *Rizzo*, 425 F.Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977); *Blackshear Residents Org.* v. *Housing Auth. of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1972); *Banks* v. *Perk*, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part,*

473 F.2d 910 (6th Cir. 1973). In *Henry,* the court refused to allow a railroad track to operate as an effective boundary when it had a segregative and discriminatory impact. In *Banks* v. *Perk,* the census tracts were so drawn as to perpetuate black and white segregation in the city. The court found that such artificial boundaries prevented integrated housing and chose instead to define the relevant areas on an *ad hoc* basis after an evidentiary hearing.

The court finds this precedent to be especially persuasive in the context of this case. HUD erroneously considered Vanderbilt Avenue to be the standard neighborhood boundary. The testimony at trial indicated that all of the area residents considered Vanderbilt Avenue to be part of their neighborhood. While their perceptions of the neighborhood varied slightly, each resident included the four apartment complexes discussed in this court's factual findings as part of the neighborhood. Thus, the racial composition and impact of those complexes was relevant to HUD's inquiry. By excluding them from its determination on the basis of an arbitrary and imaginary boundary, HUD distorted the true racial composition of the neighborhood. HUD, in effect, concluded that individuals on the Tract 40 side of Vanderbilt Avenue would not go into Tract 29. The court finds that the residents of the complex will not be constrained by the imaginary census tract boundaries. It is clear that the complexes in Tract 40 along Vanderbilt Avenue and Tenhill are part of the same neighborhood. They were relevant to HUD's inquiry. Thus, the court finds that HUD acted arbitrarily and capriciously in ignoring the substantial concentration of minority families in those complexes. Accordingly, HUD may not in the future limit its site selection process solely to census tract boundaries.

Defendants contend that if any *part* of Tract 40 is considered, all of Tract 40 must be considered. The court rejects this argument for the same reasons given above. Tract 40, like Tract 29, is composed of imaginary boundaries. The evidence indicates that the Tract 40 boundaries do not accurately depict the relevant neighborhood. Since some parts of Tract 40 are outside of the relevant neighborhood, the court rejects any contention that it must adhere rigidly to imaginary lines.

Moreover, defendants themselves point to the complexes in Tract 40 in order to demonstrate the insignificance of a 96 unit project in Tract 29. They contend that such a development will have little or no impact on an area with a large number of developments in the immediate area. Defendants may not attempt to minimize the impact of Tenhill by using or ignoring census tract boundaries when convenient. That inconsistency in position is at odds with HUD's affirmative duty to integrate. Therefore, if these complexes are relevant to minimize Tenhill's impact, they are revelant to amplify its impact as well.

In conclusion, census tract boundaries are not an adequate indicator of neighborhood boundaries. Where, as here, such boundaries distort the racial composition of a neighborhood and lead to an undue concentration of minorities in a small area, they may not be relied upon by HUD in approving a low-income housing project. Accordingly, HUD's use in this case of those boundaries alone was arbitrary and capricious.

B. *Reliance on Census Data*

HUD relied almost exclusively upon 1970 census data to determine the racial concentration of Tract 29. That data

indicated a 12.8% minority population in 1970. At trial, HUD admitted that the 1970 data was clearly outdated. Yet, in a startling revelation, HUD refused to depart from its practice of using census data because HUD considered it to be reliable as an area indicator and found it to be readily available.

Plaintiffs produced overwhelming evidence to demonstrate the weakness of HUD's position. That evidence was readily accessible and easily compiled in preparation for litigation by a small law firm. It indicated the drastic changes that occurred in and around Tract 29 from 1970 to the present. The area experienced a state of rapid decline both physically and economically. The tremendous increase in the numbers of minority families in the subsidized housing surrounding the proposed site was even more startling. HUD's own analysts on several occasions questioned the suitability of the proposed site for more low-income housing. The Court finds, therefore, that HUD acted arbitrarily and capriciously when it based its determination on outdated census statistics when readily accessible information clearly disputed the 1970 census figures.

HUD argues, however, that the rapid increase of minorities in the apartment complexes near Tenhill has had and will have little or no effect on the area. HUD bases this contention on an assumption that apartment complexes, such as Stapleton Houses, are self-contained units. The court finds such a conclusion to be incredible.

HUD has, in effect, ignored the totality of Staten Island housing and living patterns by its assumption. HUD indicated that Staten Island was a low density area. The area overtaken by the apartment complexes is comprised of one and two family homes. The evidence indicates that while a six-story structure will have little impact in the context

of Manhattan housing, it will have a definite impact if located at the Tenhill site on Staten Island. The impact of the larger developments, such as Stapleton Houses, Park Hill, and Fox Hill, is even more pronounced. For example, Stapleton Houses accounted for *more than half* of the census tract population and covered a large portion of the total land mass in Tract 29. In terms of the area occupied and population represented it is the dominant feature of the area. Moreover, residents in all of the complexes must enter the other parts of the community for work, recreation, travel, and shopping. Thus, it cannot be assumed that the population of these complexes will have no impact on the areas surrounding Tenhill.

HUD also contends that it is statistically improbable that a given area will shift from an area of low minority concentration to one of high minority concentration in a seven year period. HUD again assumes too much. HUD is required to take affirmative steps to determine the racial makeup of an area. Here, plaintiffs established the availability of data which seriously undermined HUD's conclusions concerning Tenhill. Moreover, community attitudes reflected their awareness of a growing racial imbalance. HUD was obligated both to test those attitudes and to compile further, updated information about the area. Its failure to do so led HUD to ignore the relevant housing conditions in the part of the neighborhood immediately outside the Tract 29 boundaries.

Thus, reliance on outdated census data as the primary indicator of racial and low-income concentration is arbitrary and capricious. Mere administrative convenience cannot justify the use of such data where the effect is to prolong and intensify an unhealthy situation. HUD is vested with a statutory duty to provide integrated housing and avoid

low-income and minority concentrations, and cannot ignore blatant indicators of concentration. The court appreciates the difficulty HUD may encounter in its attempts to compile relevant data. However, that burden is part of HUD's statutory duty. HUD may not await the 1980 census data which will inevitably reflect the changes in this community. That "wait-and-see" attitude would place the area residents in an unenviable position. As a result, HUD must look beyond census statistics and arbitrary area boundaries in attempting to ascertain the existence of a neighborhood and the changes that have occurred there.[28]

III. Tipping and Racial Concentration

Plaintiffs contend that HUD violated its statutory duty to integrate by approving a low-income housing project at the proposed site. They claim that an increase in the number of low income housing units in a neighborhood already concentrated with such housing will have a "tipping" effect on the community. They base this claim on the anticipated departure of both black and white residents in the neighborhood if another low-income housing project is built in the area. Thus, they claim that the area will tip from its present racial balance into an area of minority and low-income concentration.

A. *Tipping*

In *Trinity Episcopal School Corp.* v. *Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd on tipping*, 523 F.2d 88

[28] HUD contends that it sought objections from municipal authorities and none were received. HUD cannot justify an otherwise arbitrary act on the failure of a third party to consider adequately a proposal. It remains primarily with HUD to determine the suitability of a proposal in furtherance of its duty to integrate.

(2d Cir. 1975), the court set forth the standard for "tipping." The court stated:

> We conclude for the purposes of this litigation that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment. The criteria to determine whether an area has reached or is approaching this point are: (1) the gross numbers of minority group families in a measurable economic or social group which are likely to affect adversely Area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area. *Id.* at 1065-66.

Under that standard, plaintiffs are required to produce convincing evidence that construction at the proposed site will cause the area to "tip." *See Otero* v. *New York City Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973). The court finds that plaintiffs have sustained their burden of proof on the issue of tipping.

First, the area surrounding Tenhill is concentrated with minority families. The evidence indicates a rapid influx of low-income, minority families within the last eight years. The evidence convincingly demonstrates that the 1970 estimate of minority population in the area is outdated and does not reflect the current condition of the neighborhood. Moreover, Tenhill is at the center of a tightly patterned group of apartment complexes with excessive concentra-

tions of low-income minority families. Tenhill represents the seam of a closely drawn minority "pocket ghetto" which will inevitably tear the fabric of a racially integrated community. Thus, consistent with this court's determination that census tract boundaries alone are not accurate yardsticks, the court finds that Tenhill is an area of excessive minority concentration.

Second, community services and facilities have deteriorated and will not adequately support further low-income housing. Both residents and analysts indicated a blighted area, without prospect for any economic recovery. A crime and fire hazard exists and is complicated by the decrease in municipal services in the area. Most of the criminal activity centers around Tenhill and the other projects.[29] The schools are low-income and minority concentrated, and are marked by poor scholastic achievement. The businesses in the area have been hard hit by rapid and persistent deterioration. Many business have closed, leaving the community residents with inadequate or distant shopping facilities. Moreover, travel costs for Staten Island residents are high in relation to other parts of the city, and will add a further burden to low-income area residents.

Third, the community has voiced vehement objections to the construction of another low-income housing complex. The residents who testified indicated that many have left or are in the process of leaving the neighborhood. They stated that they would also leave if Tenhill was built. They and their neighbors see this as the "last straw" that will insure the ghettoization of the area. This attitude is shared by *both black and white* residents who have decided to

[29] Even the developer did not escape the rise in criminal activity. Its construction trailer was burned by vandals at the Tenhill site.

abandon the neighborhood because they refuse to live in a ghetto. Those individuals who testified or presented stipulated testimony represent civic and homeowner groups in the area as well as themselves. No residents who *approved* of Tenhill were produced to rebut their assertions.

The "tipping" context presented here is, therefore, clearly distinguishable from that found in *Trinity*. In *Trinity*, the court noted:

> The assertion that a community might tip because of the unsupported fears of its residents demonstrates the inherent weakness of that tipping concept. In large measure, *the tipping point is a subjective and prejudicial reaction of whites to minority group encroachment and to that extent is subject to a wide range of subjective factors. Id.* at 1072 (emphasis added).

Here, in contrast, *no racial majority* clearly exists. While the area contains a disproportionate concentration of minority families, the white population has not stood by itself in protest of the continued ghettoization of the area. Instead, *this integrated community* objected to the further increase in low-income housing in the area.

Finally, HUD has failed to indicate the absence of more appropriate sites on Staten Island. The evidence indicates that few parts of Staten Island outside of this area are concentrated with low-income or minority concentration. There is no rational basis for the continued concentration of low-income housing complexes in this area. HUD has failed to establish that the housing needs of New York's low-income minority population could not be better served by funding alternate, more desirable proposals.[30]

[30] Plaintiffs seek to set aside subsections (i) and (ii) of 24 C.F.R. 800.112(c) (1), *supra* at note 27, on the ground that they conflict

Accordingly, the court finds that Tenhill will inevitably result in the "tipping" of the neighborhood, and its construction with federal funding must be enjoined.[31] The conclusion to be drawn from the evidence is that this is not the neighborhood which HUD assumed it to be. The court must therefore alleviate the condition before it grows worse. As the court noted in *Karlen* v. *Harris, supra* at 5282:

> No construction has yet been commenced. It would be folly not to heed the most modern thinking on the subject where a major undertaking is involved. After all, what doctor would fail to use the most recently discovered curative medicine merely because the patient had become ill prior to its discovery?

B. *Undue Concentration of Low-Income Housing*

Tenhill, as a §8 project, will further the concentration of low-income housing in the community. In *Karlen* v. *Harris,* No. 78-7147 (2d Cir. Dec. 14, 1978), the Court of Appeals for the Second Circuit enjoined the construction of a low-income housing project in an area containing an already

---

with the relevant housing acts. The court finds no need to reach that question here. The evidence indicates that those exceptions were not met in this case. HUD has submitted no evidence to show that, at present, there are alternate, suitable housing sites on Staten Island for low income housing. Moreover, the evidence clearly indicates that an overriding need for housing of this nature does not exist in this housing market area. Therefore, the court declines to accept plaintiffs' challenge at this time.

[31] Similarly, if the focus of inquiry is narrowed to include only the compact network of apartment complexes on either side of Tenhill, the conclusion is inescapable that a "pocket ghetto" has been created by concentrated low-income, minority housing in this small area. *See Otero* v. *New York City Housing Auth., supra.*

high concentration of low-income housing. The court found that such concentration, regardless of its impact on a "tipping" analysis, was contrary to HUD's affirmative duty to develop integrated communities through its housing policies. The Court rejected New York City's low-income housing shortage as a justification for continued concentration of low-income housing in one area. It noted:

> The importance of this decision lies in the fact that once a high-rise low-income apartment is built on Site 30, *the character of the neighborhood is permanently established—at least for the life of the structure—if as represented, it adds to an already concentrated group of low-income buildings.* This construction will not be a temporary stopgap to enable the City to solve its problem for adequate housing for its low-income population. The Congress did not authorize the use of federal resources for this single purpose. *Id.* at 5280 (emphasis added).

The court finds this statement even more relevant to this case, given the low density housing in the community surrounding Tenhill, and the general environment of Staten Island.

Furthermore, *Karlen* requires HUD to consider communities and the impact of low-income housing on an *ad hoc* basis. The court, relying on its decision in *Otero* v. *New York City Housing Auth., supra,* held:

> Once the *area* is committed to a high concentration of low-income housing, the Congressional purpose of racial and economic integration is thwarted. *Id.* at 5283 (emphasis added).

Therefore, there is no requirement that HUD limit its scope of inquiry to artificial census tract boundaries when determining the concentration of low-income housing in an area. Where, as here, the immediate area surrounding Tenhill has demonstrated a definite pattern of low-income housing and that housing problem is further compounded by high minority concentration, the project must be enjoined.[32]

Defendants argue that evidence of low-income concentration in a community is inappropriate for a "tipping" analysis according to the holding in *Trinity Episcopal School Corp.* v. *Romney, supra.* In *Trinity,* plaintiffs' had failed to demonstrate any correlation between low-income and minority populations. Thus, the Court found any evidence of low-income population unconvincing in a tipping situation. In this case, the evidence demonstrates the correlation that exists between the low-income and minority populations in the *New York City area.* While such a correlation may not be drawn in many other areas of the country, the testimony and exhibits at trial indicated that the correlation may be drawn and used as probative evidence of the issue presented. Thus, the correlation, *if established,* may add some weight to a "tipping" analysis.

Even if the correlation was not established, or if established not usable as any evidence of "tipping", the racial elements of "tipping" are convincingly shown in this case. Moreover, under the analysis used in *Karlen* v. *Harris,*

[32] Plaintiffs post-trial memorandum raises a violation of the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.* as another basis for enjoining HUD's approval of Tenhill. The court finds that the location of Tenhill in an area with a high concentration of low-income housing supports plaintiffs contentions. *See Karlen* v. *Harris, supra.* Since this court has found numerous other bases for enjoining HUD's action, an extended discussion of this basis for issuing an injunction is unnecessary.

supra, there is convincing evidence that the area is concentrated with low-income housing. Therefore, without making any correlation between low-income and minority populations, the evidence supports plaintiffs' claims. Accordingly, the court finds that the use of federal funds for the development of Tenhill must be enjoined.

IV. Relief

Plaintiffs seek to enjoin the use of federal funds for the construction of Tenhill.[33] They have adequately shown that they will suffer immediate, irreparable harm and that adequate remedies at law are not available. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). If Tenhill is built, plaintiffs will be deprived of the benefits associated with an integrated community. *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972).

Accordingly, the permanent injunction must issue. HUD's approval of the proposed site for low-income housing is stricken. HUD is permanently enjoined from providing or reserving federal funds for the construction of a low-income housing project at the proposed site.

This decision shall constitute the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. The decision shall constitute the final judgment of the court. Accordingly, the Clerk of the Court is directed to enter a final judgment pursuant to Fed. R. Civ. P. 54, 58.

So ordered.

/s/ Mark A. Costantino
U.S.D.J.

[33] The developer will not be enjoined from constructing Tenhill. However, the injunction will prevent the issuance of federal funds for that purpose.

APPENDIX "B"

(Judgment)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 78 C 1967

SAME TITLE

A memorandum and order of Honorable Mark A. Costantino, United States District Judge, having been filed on February 8, 1979, making findings of fact and conclusions of law, ordering that HUD's approval of the proposed site for low-income housing is stricken, and permanently enjoining HUD from providing or reserving federal funds for the construction of a low-income housing project at the proposed site, it is

ORDERED and ADJUDGED that upon the Court's findings of fact and conclusions of law, HUD's approval of the proposed site for low-income housing is stricken, and it is further

ORDERED and ADJUDGED that HUD is permanently enjoined from providing or reserving federal funds for the construction of a low-income housing project at the proposed site.

Dated: Brooklyn, New York
February 8, 1979

/s/ RICHARD H. WEARE
Clerk

Approved:

/s/ MARK A. COSTANTINO
U.S.D.J.

APPENDIX "C"

(Notice of Appeal)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 78 Civ. 1967

SAME TITLE

NOTICE IS HEREBY GIVEN that Faymor Development Co., Inc., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a partnership, defendant above named in Civil Action 78 Civ. 1967 M.A.C., appeals to the Court of Appeals for the Second Circuit from each and every part of that final judgment entered in said action on February 7, 1979.

Dated: New York, New York
February 21, 1979.

DAVIS & COX
By /s/ MARC J. ADELSOHN
MARC J. ADELSOHN
A Member of the Firm
Attorneys for Plaintiff-Appellant
Faymor Development Co., Inc.
Office & P.O. Address
One State Street Plaza
New York, New York 10004
[212] 425-0500

Appendix "C"

To: HALL & THOMPSON, ESQS.
Attorneys for Plaintiffs
57 Beach Street
Staten Island, New York 10304

EDWARD R. KORMAN, ESQ.
United States Attorney for the
Eastern District of New York
Attorney for Defendant
Patricia Harris, Secretary of the
United States Department of
Housing and Urban Development
225 Cadman Plaza East
Brooklyn, New York 11201

APPENDIX "D"

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 79-7144

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the second day of November, one thousand nine hundred and seventy-nine.

Present:

HONORABLE THOMAS J. MESKILL,
HONORABLE AMALYA L. KEARSE,

Circuit Judges,

HONORABLE JOHN F. DOOLING,

*District Judge.**

EVELYN M. KING, Individually and as President of THE STATEN ISLAND BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; DONALD ASINOBI, Individually and as Treasurer of the CLIFTON HOME OWNERS ASSOCIATION; CYNTHIA MAILMAN, Individually and as Representative of the STAPLETON CIVIC ASSOCIATION, INC.; LOUIS P. WEIN, Individually and as Chairman of the CLIFTON HOMEOWNERS ASSOCIATION; AMELIA HALL, Individually and as Representative of the CLIFTON HOMEOWNERS ASSOCIATION; HELEN R. POSE,

* Judge, Eastern District of New York.

Appendix "D"

Individually and as President of the STAPLETON CIVIC ASSOCIATION, INC.,

Plaintiffs-Appellees,

v.

PATRICIA HARRIS, Secretary of the United States Department of Housing and Urban Development,

Defendant,

and

FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of TENHILL-FAYMOR HOUSING ASSOCIATES, a partnership,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

We agree with the decision of the district court to permanently enjoin the Secretary of the United States Department of Housing and Urban Development (HUD) from financing or funding under Section 8 Housing Assistance Payments Program the construction of the 96-unit housing project called "Terrace Gardens" in an area on Staten Island known as Hill Street.

One of appellant's claims on appeal is that even if HUD's approval of the project were arbitrary and capricious the district court should have remanded the matter to HUD rather than issue a permanent injunction. Inasmuch as

Appendix "D"

the Secretary of HUD has not appealed from the judgment below, we find this argument by appellant unpersuasive.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, substantially on the opinion of Judge Costantino below.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ AMALYA L. KEARSE
Amalya L. Kearse, U.S.C.J.

/s/ JOHN F. DOOLING
John F. Dooling, U.S.D.J.

APPENDIX "E"

(Statutory Provisions Involved)

Administrative Procedure Act

§ 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Appendix "E"

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Housing and Community Development Act of 1974, Title II

§ 1437. Declaration of Policy

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-income housing project.

• • • • •

§ 1437 f. Lower-income housing assistance

Authorization for assistance payments

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section.

Appendix "E"

Authorization for contracts for assistance payments

(b)(1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) To the extent of annual contributions authorizations under section 1437c(c) of this title, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners.

Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(c)(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall

Appendix "E"

not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 1439(a)(5) of this title. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative.

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs

which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

(3) The amount of the monthly assistance payment with respect to any dwelling unit, in the case of a large very low-income family, a very large lower income family, or a family with exceptional medical or other expenses, as determined by the Secretary, shall be the difference between 15 per centum of one-twelfth of the annual income of the family occupying the dwelling unit and the maximum monthly rent which the contract provides that the owner is to receive for the unit. In the case of other families, the Secretary shall establish the amount of the assistance payment as the difference between not less than 15 per centum nor more than 25 per centum of the family's income and the maximum rent, taking into consideration the income of the family, the number of minor children in the household, and the extent of medical or other unusual expenses incurred by the family. Reviews of family income shall be made no less frequently than annually (except that such reviews may be made at intervals no longer than two years in the case of families who are elderly families).

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty

days (A) in the event that a family vacates a dwelling unit before the expiration date of the lease for occupancy or (B) where a good faith effort is being made to fill an unoccupied unit, and, subject to the provisions of the following sentence, such payments may be made, in the case of a newly constructed or substantially rehabilitated project, after such sixty-day period in an amount equal to the debt service attributable to such an unoccupied dwelling unit for a period not to exceed one year, if a good faith effort is being made to fill the unit and the unit provides decent, safe, and sanitary housing. No such payment may be made after such sixty-day period if the Secretary determines that the dwelling unit is in a project which provides the owner with revenues exceeding the costs incurred by such owner with respect to such project.

(5) Assistance payments may be made with respect to up to 100 per centum of the dwelling units in any structure upon the application of the owner or prospective owner. Within the category of projects containing more than fifty units and designed for use primarily by nonelderly and nonhandicapped persons, the Secretary may give preference to applications for assistance involving not more than 20 per centum of the dwelling units in a project. In according any such preference, the Secretary shall compare applications received during distinct time periods not exceeding sixty days in duration.

(6) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation

of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

(7) At least 30 per centum of the families assisted under this section with annual allocations of contract authority shall be very low-income families at the time of the initial renting of dwelling units.

(8) To the extent authorized in contracts entered into by the Secretary with a public housing agency, such agency may purchase any structure containing one or more dwelling units assisted under this section for the purpose of reselling the structure to the tenant or tenants occupying units aggregating in value at least 80 per centum of the structure's total value. Any such resale may be made on the terms and conditions prescribed under section 1437c(h) of this title and subject to the limitation contained in such section.

• • • • •

Definitions

(f) As used in this section—

(1) the term "lower income families" means those families whose incomes do not exceed 80 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of his findings that such variations are necessary because of prevailing levels of construction costs, unusually high or low family incomes, or other factors;

(2) the term "very low-income families" means those families whose incomes do not exceed 50 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families;

(3) the term "income" means income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary;

(4) the term "owner" means any private person or entity, including a cooperative, or a public housing agency, having the legal right to lease or sublease newly constructed or substantially rehabilitated dwelling units as described in this section;

(5) the terms "rent" or "rental" mean, with respect to members of a cooperative, the charges under the occupancy agreements between such members and the cooperative; and

(6) the term "debt service" means the required payments for principal and interest made with respect to a mortgage secured by housing assisted under this chapter.

• • • • •

Fair Housing Act of 1968

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Appendix "E"

HOUSING AND URBAN
DEVELOPMENT REGULATIONS

CHAPTER VIII—LOW INCOME HOUSING
(TITLE 24 C.F.R.)

§ 880.112. *Site and neighborhood standards.*

Proposed sites for new construction projects must be approved by HUD as meeting the following standards:

(a) The site shall be adequate in size, exposure and contour to accommodate the number and type of units proposed; and adequate utilities (water, sewer, gas and electricity) and streets shall be available to service the site.

(b) The site and neighborhood shall be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued pursuant thereto.

(c) The site shall not be located in:

(1) An area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national

Appendix "E"

origin renders sites outside areas of minority concentration unavailable.)

(2) A racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

(d) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(e) The site shall be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards, or mudslides; harmful air pollution, smoke or dust; excessive noise, vibration, or vehicular traffic; rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is seriously detrimental to family life or in which substandard dwelling or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

(f) The site shall comply with any applicable conditions in the Local Housing Assistance Plan, approved by HUD.

(g) The housing shall be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unsubsidized, standard housing of similar market rents.

(h) Travel time and cost via public transportation or private automobile, from the neighborhood to places of employment providing a range of jobs for lower-income

workers, shall not be excessive. (While it is important that elderly housing not be totally isolated from employment opportunities, this requirement need not be adhered to rigidly for such projects.)

(i) The project may not be built on a site which has occupants unless the relocation requirements referred to in § 880.113 are met.

(j) The project may not be built in an area that has been identified by HUD as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the project is covered by flood insurance as required by the Flood Disaster Protection Act of 1973, and it meets any relevant HUD standards and local requirements.

Supreme Court, U. S.
FILED
MAR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1178

FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a Partnership,

Petitioner,

EVELYN M. KING, Individually and as President of the Staten Island Branch of the National Association for the Advancement of Colored People, DONALD ASINOBI, Individually and as Treasurer of the Clifton Home Owners Association, CYNTHIA MAILMAN, Individually and as Representative of the Stapleton Civic Association, Inc., LOUIS P. WEIN, Individually and as Chairman of the Clifton Homeowners Association, AMELIA HALL, Individually and as Representative of the Clifton Homeowners Association, HELEN R. POSE, Individually and as President of the Stapleton Civic Association, Inc.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN G. HALL
JOHN S. WELLEKENS
HALL & THOMPSON
57 Beach Street
Staten Island, New York 10304
Attorneys for Respondents

Dated: February 29, 1980.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutory Provisions Involved	4
Reasons for Denying the Writ	16
Conclusion	40
Appendix "A"	
Statutory Provisions Involved	1a

TABLE OF AUTHORITIES

Cases:	Page
American Trucking Assns. v. U.S. 364 U.S. 1 (1959)	27
Arkansas Best Freight Systems Inc. v. United States, 364 F. Supp. 1239 (W.D. Ark. 1973)	27
Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972) aff'd in part, 473 F. 2d 910 (6th Cir. 1973)	17
Blackshear Residents Organization v. Housing Authority of City of Austin, 347 F. Supp. 1138 (W.D. Tex. 1971) (ii)	17
Citizen Bank of Potawotomi Indians v. United States, 391 F. 2d 614 (Ct. Cl.) cert. denied 390 U.S. 957 (1968)	27
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)	37
Environmental Defense v. Corps of Engineers, 429 F. 2d 1123 (5th Cir. 1974)	36

	Page
Hanley v. Kleindienst 471 F. 2d 823 (2d Cir. 1972)	36
Karlen v. Harris, 590 F. 2d 39 (2d Cir. 1978) reversed, Strykers Bay Neighborhood Council, Inc. v. Karlen __U.S.__, 100 S. Ct. 497 (1980)	31,32,33, 34,37
Otero v. New York City Housing Auth. 484 F. 2d 1122 (2d Cir. 1973)	16,20,33
Shannon v. HUD 436 F. 2d 809 (3d Cir. 1970)	16
Trinity Episcopal School Corp. v. Romney 387 F. Supp. 1044 (S.D.N.Y. 1974) aff'd as to tipping, 523 F. 2d 88 (2d Cir. 1975)	17,20,30, 35,36
Zuber v. Allen 396 U.S. 168 (1969)	26
Statutes and Rules:	
Administrative Procedure Act 42 U.S.C. 706	4, 37

	Page
Fair Housing Act of 1968 42 U.S.C. 3601 et seq.	4, 17, 25
Housing and Community Development Act of 1974, Section 8 Housing Assistance Payments Program 42 U.S.C. 1437 et seq.	4, 25
42 U.S.C. 1437 (f)	4, 6, 17
Housing and Community Development Act of 1974 42 U.S.C. 5301 et seq.	5, 18
Judiciary and Judicial Procedure 28 U.S.C. 1254 (1)	3
National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.	15, 17, 35
42 U.S.C. 4332 (2) (c)	5, 36
42 U.S.C. 4332 (2) (D)	5, 36
HUD Regulations, Chapter VIII-Low Income Housing Site and Neighborhood Standards (24 C.F.R. 880.112)	5,7,9,10, 18,38,39

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No.

FAYMOR DEVELOPMENT CO. INC., ET. AL.,

Petitioner,

-against-

EVELYN M. KING, ET. AL.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Evelyn M. King, et. al, appellees below, pray that the Petition dated January 31, 1980 of Petitioner for a Writ of

Certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of the Second Circuit entered November 2, 1979, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, review of which is sought, is not officially reported, and is reproduced as Appendix "A" to the Petition (PA-39a).[1]

The opinion of the District Court for the Eastern District of New York is reported at 464 F. Supp. 827 (PA-1a).

JURISDICTION

The judgment of the United States

1. Hereafter, references such as PA-39a, etc. refer to the Appendixes annexed to the Petition.

Court of Appeals for the Second Circuit was entered on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals (and the District Court) clearly err in finding: a) That the almost exclusive use of Census Tract Boundaries and Census Data and the reliance solely thereon by the defendant United States Department of Housing and Urban Development ("HUD") in the application of HUD Site and Neighborhood Standards was arbitrary and capricious?, b) that the relevant community was at the tipping point and that Tenhill's Terrace Gardens project would tip that community.

2. Did the Court of Appeals (and the District Court) clearly err in not remanding the Terrace Gardens proposal to HUD for further consideration and, instead, granting a permanent injundtion which enjoined HUD from providing or reserving federal funds for the construction of a low-income housing project at that site by Tenhill.

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 5, Section 706 (Administrative Procedure Act Sect. 706) (PA-42a);

2. United States Code, Title 42, Sections 1437 and 1437 (f), (Housing and Community Development Act of 1974, Sect. 8 Housing Assistance Payments Program) (PA-43a);

3. United States Code, Title 42, Section

3601 (d)(5) (Fair Housing Act of 1968) (RA-5a);[2]

4. United States Code, Title 42, Sections 4332 (2)((c) and 4332 (2)(D) (National Environmental Policy Act of 1969) (RA-1a);

5. United States Code, Title 42, Section 5301 (Housing and Community Development Act of 1974) (RA-3a);

6. 24 Code of Federal Regulations, Section 880.112 (HUD Site and Neighborhood Standards) (PA-50a).

STATEMENT OF THE CASE

In or about 1975, Petitioner submitted a preliminary proposal to HUD for the development of a six story multi family apartment house to be known as Terrace Gardens Housing for

---

2. Hereafter, references such as RA-5a, etc., refer to the Appendix annexed to the Respondents' Brief.

the Elderly, to be located at the southwest corner of Tompkins and Hill Street, Staten Island, New York. The proposal was submitted under the Section 8 Housing Assistance Payments Program, Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. 1437 (f). Pursuant to the HUD procedure, the proposal was referred to the various HUD technical branches, which at that time included the Equal Opportunity Division ("EO") and Housing Management Division ("HM"), for review.

The EO division found the site to be "Not Approvable" in that it did not "meet the site and neighborhood standards of

Section 880.112 (b)(c)(d)."[3] The HM division determined that "the proposed location of the project would adversely affect other subsidized housing" in the area.[4]

---

3. The HUD Site and Neighborhood Standards Section 880.112 (b) (c) (d) in 1975 were identical to the Site and Neighborhood Standards, which were applicable to the instant proposal, set forth at PA-50a.
4. Subsequent to these negative recommendations, Faymor appealed their findings and a joint EO-HM field trip to the site was made. Their field trip report indicated that a) the 1970 census which revealed a 12.8 percent minority population in the census tract containing the proposed site "might be changing to a higher percentage of minorities;" b) that there was already more than an "ample allotment of publicly-assisted housing for their neighborhood;" c) that approval of this site would "cause an increase of an undue concentration of assisted units" in the neighborhood, "Staten Island is suburban enough to avoid such concentration." d) the state project (New York City Housing Authority 693 Unit Project) was "approximately 50% minority" with a "turnover...close to 20% annually" and this "turnover is increasing."

The project was not approved by HUD.

In response to a HUD Notification of Fund Availability for 1,000 family dwelling units of new construction under the Section 8 Housing Assistance Payments Program, to be located in the City of New York, Tenhill on or about June 22, 1977 submitted a preliminary proposal for the development of a six-story, ninety-six unit low income housing project at the same site for which the prior proposal had been found "not approvable."

This proposal was again referred to the various HUD technical branches which at that time included the Equal Opportunity Division and the Economic

e) "the area was deteriorating and perhaps a little dangerous for the elderly."

and Market Analysis Division ("EMAD") among others.

The EO division again had the duty to determine if the proposed site met those portions of the Site and Neighborhood Standards which were concerned with the minority concentration of the area surrounding the proposed site.[5] The EO specialist's review consisted solely of checking the 1970 census data for the census tract in which the proposed site was located, determining that the said tract had a total of 4,623 persons, including 4,000 white persons and 623 minority persons, with a minority population of 12.8 percent, and recommending approval of the proposal. His one page, form report,

5. 24 C.F.R. 880.112 (b) (c)

contained no reference to the prior EO reports for this site.

The EMAD division, recently established, now had the duty to determine if the proposed site met the Site and Neighborhood Standard which required that the site "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons."[6] The EMAD specialist determined that the 1970 census was outdated and that the site did not meet the aforesaid standard and recommended its disapproval.[7]

6. 24 C.F.R. 880.112 (d)

7. The EMAD report stated in pertinent part: "Subject site is in a Census Tract impacted with subsidized housing (Section 221 (d) BMIR and Section 236) and Stapleton Houses (700 units of state aided low income housing). Data from 1970 Census is not reflective of current conditions."

The EMAD report, however, was somehow misplaced and not considered in the HUD review of the Tenhill proposal.[8]

Tenhill's preliminary proposal was approved by HUD on or about August 10, 1977 and Tenhill thereafter submitted a final proposal which was approved by HUD, which agreed to provide financial assistance in two forms: a) federal insurance of a privately financed building loan and first mortgage of $4,369,100 for construction of Terrace Gardens; and b) payments to Tenhill for rental assistance

8. The HUD acting area director who testified at the trial could not recall how the EMAD report was misplaced or how she approved the proposal without that portion of the total processing check list, although HUD failed to produce the official directly responsible for the reviewing the various divisional reports, who was still with HUD.

for units occupied by eligible Section 8 residents, for which HUD reserved $749,112.00 per annum.

On September 6, 1978, prior to the closing of the mortgage commitment and commencement of construction, respondents filed a complaint in the United States District Court for the Eastern District of New York for a preliminary and permanent injunction to enjoin HUD from providing any federal funds or insurance to Tenhill for the aforesaid proposed project.

Respondents moved by order to show cause for a preliminary injunction. On the return date, HUD advised the Court and counsel of the existence of the misplaced EMAD report and requested that the Tenhill proposal be remanded to HUD for further consideration in

light of said report. Upon further consideration by HUD, the EMAD report was overruled and the original approval of the Tenhill proposal was sustained by the acting area director who approved the site originally.[9]

An evidentiary hearing on respondent's application for a preliminary injunction was held before the District Court, but following the commencement of Tenhill's case, the District

---

9. The HUD Deputy Area Manager's report to the Court states in pertinent part: "The Census Tract in which the project is located had a reported median income ($8,987) in the 1970 Census more than $600 above 80% of the new SMSA median, and thus could not be established as a low income concentrated area." and overruled the EMAD negative review of the proposal. HUD used the same 1970 census figures found by EMAD to be outdated to overrule the EMAD report!

Court directed that the evidentiary hearing be deemed consolidated with the trial of respondent's complaint for a permanent injunction, said consolidation not having been objected to by any of the parties to the action.

The District Court held that HUD had acted arbitrarily and capriciously in approving the Tenhill proposal, that the surrounding community was in danger of tipping and that the proposed project would "tip" the community into a non-white, low-income ghetto, and permanently enjoined HUD "from providing or reserving federal funds for the construction of a low-income housing project at the proposed site. "464 F. Supp. at 845; (PA-35a).[10]

10 The District Court in its opinion also noted: "Plaintiff's post-trial memorandum raises a

Tenhill and HUD appealed to the United States Court of Appeals for the Second Circuit, but HUD subsequently withdrew its appeal. The Circuit Court affirmed "...substantially on the opinion...below."[11]

violation of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. as another basis for enjoining HUD's approval of Tenhill. The Court finds that the location of Tenhill in an area with a high concentration of low-income housing supports plaintiff's contentions. See Karlen v. Harris, supra. Since this court has found numerous other basis for enjoining HUD's action, an extended discussion of this basis for issuing an injunction is unnecessary." 464 F. Supp. at 844 (PA-34a).

11. The Court of Appeals released its decision on November 2, 1979, the day following argument, apparently realizing that "the area's black and white community stands ready to abandon the area if Tenhill is built" and that the community needed immediate reassurance that their neighborhood was not going to become a ghetto.

REASONS FOR DENYING THE WRIT

1. The finding that HUD's reliance on census tract boundaries in vacuo in order to delineate a relevant area of minority or low-income concentration and HUD's reliance solely on the census data for said tract was arbitrary and capricious and in violation of HUD's statutory duty to integrate does not present an important question for this Court to review.

While HUD has the responsibility for administering the federal programs in a manner which will further the national policy on housing, HUD also has the concomitant "affirmative duty to promote racial integration through its housing policy."[12] Shannon v.

12. 464 F. Supp. at 837(PA 17a)

HUD, 436 F. 2d 809 (3rd Cir. 1970), Otero v. New York City Housing Auth., 484 F. 2d 1122 (2d Cir. 1973); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), aff'd as to tipping, 523 F. 2d 88 (2d Cir. 1975).[13]

Congress set forth its mandate that HUD take affirmative action to promote fair, decent and "open, integrated residential housing patterns" in the Housing and Community Development Act of 1974, 42 U.S.C. 1437 (f), the Fair Housing Act of 1968, 42 U.S. C. 3601 et seq., the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., the Housing and Community Development Act

13. Accord, Banks v. Perk, 341 F.Supp. 1175 (N.D. Ohio 1972) aff'd in part, 473 F. 2d 910 (6th Cir. 1973) Blackshear Residents Organization v. Housing Authority of City of Austin 374 F. Supp. 1138 (W.D. Tex.1971)

of 1974, 42 U.S.C. 5301, et seq.

In order to implement its housing programs, HUD, spurred on by Court action, adopted Site and Neighborhood Standards to govern the process of selecting the best possible sites for housing projects to be funded.[14] These standards were intended to avoid the concentration of minority and low-income families in areas of high minority or low-income concentration.

As developed in the trial before the District Court below, HUD has also adopted policies not set forth in its published regulations, in this case, the policy that, only the

---

14 24 C.F.R. 880.112 (PA-50a). For history see HUD's Statement of Policy in Notice of Proposed Rule Making, 24 C.F.R. 200. 704,880.112, in 42 Fed. Reg. 4269-4299 (Jan. 24, 1977).

neighborhood or community which lies within the same census tract boundaries as the site of the proposed project will be affected by the proposed project and that only the last census statistics are applicable to a determination of minority or low-income concentration.[15]

In reviewing Tenhill's proposal, HUD followed its "policy" to the letter and checked the census book, determined the 1970 racial composition of the census tract and approved the proposal.[16] The District Court held that

---

15. HUD relied principally upon its new proposed Site and Neighborhood Standards (42 Fed. Reg. No. 15) as an expression of HUD policy for the exclusive use of "census tracts", but as clearly indicated therein, even the proposed regulations are not so restrictive. 464 F. Supp. at 838 (PA-20a)

16. The HUD EO specialist testified that even had the "Park Hills/Fox Hills" low income projects of more than 4,000 tenants been located directly across the street from the proposed site but in a different census

where "such boundaries distort the racial composition of a neighborhood and lead to an undue concentration of minorities in a small area, they may not be relied upon by HUD in approving a low-income housing 'project", and that their use in this case was arbitrary and capricious. 464 F. Supp. at 840 (PA-25a). The size of an area to be considered in the evaluation of a site is a question of fact. Otero v. New York City Housing Authority 484 F. 2d at 1134. In Trinity Episcopal School Corp. v. Romney, supra, the District Court held under the facts of that case that the relevant community was a community planning district, 387 F. Supp. at 1066. As fully set forth in the District Court's opinion, respondents offered substantial

---

tract, HUD would not have considered them because they would be in a different census tract.

and convincing evidence both as to the relevant community or area which would be affected by the proposed project and as to the actual conditions, i.e. the concentration of minority and low-income persons in the area.

Petitioner argues that "the holding of the lower courts, if permitted to stand as a guide in future cases, would place an intolerable burden upon HUD and upon developers." (P-6). Significantly, and as the Court of Appeals also noted (PA-40-41a), HUD did not find the holding of the lower courts to be so intolerable as to require an appeal.[17] The District Court noted its appreciation of "the difficulty HUD may encounter in its attempts

---

17. HUD filed a notice of appeal from the Dist-Court's judgment just prior to the running of the statutory period, apparently to protect its right to appeal, but withdrew its appeal soon thereafter.

to compile relevant data" on minority and low-income concentration but correctly noted:

> "that burden is part of HUD's statutory duty....HUD must look beyond census statistics and arbitrary area boundaries in attempting to ascertain the existence of a neighborhood and the changes that have occurred there." 464 F. Supp. at 841 (PA-28a).
>
> "Thus, reliance on outdated census data as the primary indicator of racial and low-income concentration is arbitrary and capricious. Mere administrative convenience cannot justify the use of such data where the effect is to prolong and intensify an unhealthy situation." Id. at 841, (PA-27a).

The District Court, and by its affirmance, the Court of Appeals, did not hold that census tract boundaries and census data may not be considered by HUD in its evaluation of a site but only that:

> "imaginary census tract boundaries alone reflect neither a community's perception of itself nor the social cohesiveness of a given area. While census tracts may provide HUD with a general indication of residential patterns, they are inadequate as the sole indicators of the racial or economic composition of housing in a neighborhood." 464 F. Supp. at 839 (PA-23a) (emphasis added)

The courts below have merely held that HUD has a duty to look beyond census data, particularly when it is "clearly outdated" as admitted by HUD in this case, 464 F.Supp. at 840 (PA-26a), and make an "ad hoc" determination as to the identity of the affected community.

The petition quotes the words "ad hoc" more than twenty times in its petition, making many incorrect inference with regard to the District Court's reference thereto. The only use of that term made by the District Court was that HUD may not use a preconceived determination of

what size area may be affected by a given project (whether it be 100 units or 10,000 units) but rather that HUD make an "ad hoc" or individualized determination in each instance. The Court did not as petitioner infers require that the entire evaluation process be administered in such a fashion.

Respondents produced substantial and overwhelming evidence to prove that the relevant area had a heavy concentration of minority and low income families. The great majority of this evidence was already in HUD's files, although not in the file on this project. Both the New York City Housing Authority and the privately owned but federally financed low income housing projects in the area were required to and did file annual reports with HUD which included detailed statistics on racial

composition and income levels for their tenants. Unfortunately, the EO specialist was aware of the existence of these reports but chose not to look at them. The other major sources for respondent's information were the local schools which readily provided the information. To require that HUD make even these minimal attempts at obtaining more pertinent and up to date information in evaluating a proposed site should not be said by even the petitioner to be such an "intolerable burden upon HUD and upon developers" as to "thwart the purposes of the Fair Housing Act of 1968 and the Housing and Community Development Act of 1974." (P-6)

A remand to the agency is not always required, a) Where there is an administrative record, b) the facts have been fully developed on trial, c) the agency and developer had an

opportunity to and did actually submit additional "post hoc" evidence and rationalizations in support of the original determination, d) the administrative agency, as HUD herein, did not choose to request a remand as alternative relief in the District Court and did not prosecute an appeal to the higher Court, and where the agency would have no choice on a remand but to come to the same conclusion as the Court did. In ZUBER v. ALLEN, 396 U.S. 168 (1969) the government also did not press for a remand while the private petitioner, as Tenhill herein, did press for a remand; this Court found that a remand to the agency would be inappropriate, stating:

> "Although the Secretary does not press the point, the private petitioners argue that this Court should at the very least reverse for a trial on the merits or alternatively reverse with instructions to remand to the Secretary for further

consideration.

> This is not a case where a department has acted without a formal record. In such instances a trial might be appropriate to afford the department an opportunity to develope those facts which underpin its action. When action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons. A remand to the Secretary is inappropriate in the absence of a request by the Government. Counsel for the Department has advanced no new theory for sustaining the order." Id. at 196

See also American Trucking Assns. v. U.S. 364 U.S. 1, 16 (1959); Citizen Band of Potawotomi Indians v. United States, 391 F.2d 614, 624 (Ct. Cl.), cert. denied 390 U.S. 957 (1968); Arkansas Best Freight System, Inc. v. United States, 364 F.Supp. 1239, 1271 (W.D. Arkansas 1973).

Still, petitioner would have this Court reverse the Court of Appeals and District Court and remand the entire matter back to HUD for further reconsideration. Such a remand would be the death knell for this community. The District Court stated in its decision:

> "the community has voiced vehement objections to the consideration of another low-income housing complex. The residents who testified indicated that many have left or are in the process of leaving the neighborhood. They stated that they would also leave if Tenhill were built. They and their neighbors see this as the last straw that will insure the ghettoization of the area. This attitude is shared by both black and white residents who have decided to abandon the neighborhood because they refuse to live in a ghetto." 464 F. Supp. at 842, 843 (PA-30a)

> "The area's black and white community stands ready to abandon the area if Tenhill is built." Id. at 836 (PA-14a).

The community is at a crossroads; prior to Tenhill the community thought they had seen the last of low-income projects in their neighbor-

hood, they felt the community would have an opportunity to stabilize and revitalize itself. If this case is referred back to HUD, the community may very well abandon the area without waiting for HUD to come down with another determination, even though such determination would virtually have to be in the community's favor. Such a conclusion would come too late to save this community. HUD and Tenhill as stated, submitted both the original record and substantial "post hoc" facts and rationalizations. What more could they offer to the question? Respondents respectfully request this Court to end this matter now and permit this community to survive.

2. The holding of the District Court that the relevant community surrounding the proposed

site was at the tipping point and that petitioner's proposed project would tip that community from a racially integrated area into a ghetto, as affirmed by the Court of Appeals, was clearly correct.

The decision of the District Court more than adequately sets forth the relevant facts supporting its holding on tipping and respondents will not repeat those same facts unnecessarily.

The concept of "tipping," the "linchpin" of the District Court's holding, first enunciated in Otero, was further defined in Trinity Episcopal School Corporation v. Romney, supra:

> "We conclude for the purposes of this litigation that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of

> instability which result in the deterioration of the neighborhood environment. The criteria to determine whether an area has reached or is approaching this point are: (1) the gross numbers of minority group families in a measurable economic or social group which are likely to affect adversely area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area. Id. at 1065

As fully set forth in the opinion of the District Court, respondents offered overpowering evidence not only to prove that HUD had acted arbitrarily and capriciously, but also on the substantive issue, that the community was in danger of "tipping" and that the Tenhill project would in fact "tip" the community into a ghetto or at the least, complete and solidify a "pocket ghetto." At no point in its petition has petitioner even alleged, much

less cited any evidence, that the area was not in danger of tipping or that its project would not tip the area.

The timing of petitioner's petition, as well as the tenor of its argument would indicate that the application for a writ of certiorari was made solely as a result of this Court's decision in Strykers Bay Neighborhood Council, Inc. v. Karlen, U.S. ,100 S. Ct. 497 (1980), which summarily reversed the Second Circuit's holding in Karlen v. Harris 590 F. 2d 39 (2d Cir.1978). Petitioner alleges that the District Court "primarily relied" (P-6) upon Karlen, that it was the "linchpin of the decision." (P-7).[18]

Admittedly, the District Court cited the Karlen case a number of times for the following:

18. Hereafter, references such as P-6, etc. refer to the petitioner's petition.

"It is now well settled that HUD has an affirmative duty to promote racial integration through its housing policy." 464 F. Supp at 837 (PA-17a).

"these acts place a heavy burden on HUD to further national housing policy by avoiding the concentration of minority or low-income families in the same community." Id. at 837 (PA-18a)

"site selection (of housing projects) has surfaced as the major vehicle for insuring that the purposes of the Acts are accomplished". Id at 837 (PA-18a)

"Nor, in light of the national housing policies contained in the various housing Acts, could it (HUD)properly limit the scope of its inquiry to any one area (census tract) where that would distort HUD's determination." Id. at 839 (PA-21a)

"In recent years the focus has shifted to housing patterns as the underlying cause of segregation." Id at 839 (PA-22a)

"such concentration (low income housing project in an area containing an already high concentration of low-income housing), regardless of its impact on a 'tipping' analysis, was contrary to HUD's affirmative duty to develope integrated communities through its housing policies." Id. at 843 (PA-33a)

> "Karlen requires HUD to consider communities and the impact of low-income housing on an ad hoc basis. (citing Otero v. New York City Housing Auth.) Id. at 844 (PA-33a)

Respondents however, do not read this Court's decision in Stryker as reversing that substantial line of authorities, some cited previously, which the District Court relied upon. Rather, respondents believe Karlen was reversed on a very narrow point. This Court noted in its opinion that "the District Court expressly concluded that HUD had not acted arbitrarily or capriciously" and that the Court of Appeals "did not overturn that finding," _ U.S. at _, 100 S. Ct at 500. Therefore, having determined that HUD had not acted "arbitrarily or capriciously," the Court of Appeals should not have disturbed HUD's administrative determination. In this case both the District

Court and the Court of Appeals by its affirmance "expressly concluded" that HUD had acted arbitrarily and capriciously, and more importantly, that a "tipping" situation existed. The District Court herein found that not only HUD's procedure, but also its determination was arbitrary and capricious.

The issue of tipping was never considered in Karlen by the District Court, the Court of Appeals or this Court.[19] The issue involved there was rather one which arose under the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 et seq. Granted, the District Court in this case also found that NEPA was violated when

19. The tipping question had been considered previously in that case's history, Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), aff'd as to tipping, 523 F.2d 88 (2d Cir. 1975)

HUD had approved the location of Tenhill's low-income housing project in an area with a high concentration of low income housing.[20]

However, the District Court "found numerous other bases for enjoining HUD's action" and did not elaborate on the NEPA challenges.

Petitioner argues that, having followed its regulations (which HUD did not do in this

20. Respondents had also argued that HUD violated NEPA by failing to prepare an Environmental Impact Statement ("EIS") 42 U.S.C. 4332 (2) (c); that HUD's regulation which determined that an EIS was only required for projects with over 500 units were in violation of NEPA in that they ignored the difference between a Manhattan setting and one of very low density and ignored the cumulative harm that results from a series of low-income government financed projects. Hanley v. Kleindienst 471 F.2d 823 (2d Cir. 1972); that even were a formal EIS not required, that HUD failed to even consider possible alternatives, 42 U.S.C. 4332 (2) (D), Trinity Episcopal School Corp. v. Romney, supra; Environmental Defense v. Corps of Engineers, 429 F. 2d 1123 (5th Cir. 1974).

case) HUD was immune from further judicial review. (P-6). Respondents do not read this Court's decision in Strykers Bay Neighborhood Council, Inc. v. Karlen, supra, as standing for that dangerous rule of law. Not only an agency's procedure, but also the agency's determination itself must meet the "arbitrary and capricious" test, otherwise an agency need only pay "lip service" to the procedural rules and then make any determination it may desire, no matter how "arbitrary or capricious" the determination itself might be. Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, requires a "searching and careful" inquiry into the facts and "a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 416 (1971).

Petitioner lastly urges that "the District Court foreclosed consideration by HUD of other relevant factors which would have required the approval of the Terrace Gardens proposal" and refer to the HUD Site and Neighborhood Standards, particularly Section 880.112 (c) (1) (i and ii) (PA-50a). Said regulation permits HUD to approve the location of a low income housing project in an area of minority concentration where "(i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot

otherwise feasibly be met in that housing market area."

The District Court, in declining to entertain respondents application to set aside subsections (i) and (ii) of 24 C.F.R. 800.112 (c) (1) on the ground that they conflict with the relevant housing acts, stated:

> "The evidence indicates that those exceptions were not met in this case. HUD has submitted no evidence to show that, at present, there are alternate, suitable housing sites on Staten Island for low income housing. Moreover, the evidence clearly indicates that an overriding need for housing of this nature does not exist in this housing market area." 464 F.Supp. at 843 (PA-32a).

Again, it is significant that HUD chose not to even raise the aforesaid exceptions as a basis for evading the congressional mandate in favor of integration either in the administrative stage or in the District Court, nor

did it choose to appeal on that or any other issue.

Perhaps even HUD now realizes that the District Court is correct and that the area is not the proper site for another high-rise low-income housing project and has instead chosen to apply its funding to more suitable sites elsewhere.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 27, 1980

Respectfully submitted,

JOHN G. HALL
JOHN S. WELLEKENS
HALL & THOMPSON
57 Beach Street
Staten Island, New York 10304
Attorneys for Respondents

APPENDIX

APPENDIX "A"

(Statutes and Rules Involved)

NATIONAL ENVIRONMENTAL POLICY

Sect. 4321. Congressional declaration of purpose

The purpose of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Sect. 4332 Cooperation of agencies; reports;

availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible

(2) All agencies of the Federal Government shall;

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

****

(e) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

Housing and Development Act of 1974

Sect. 5301 Congressional findings and declaration of purpose

****

(c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives -

****

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of

neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.

Fair Housing Act of 1968

Sect. 3601 Declaration of Policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Sect. 3608 Administration

****

(d) The Secretary of Housing and Urban Development shall -

(5) administer the programs and activities

relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

Supreme Court, U.S.
FILED
MAR 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-1178

In the Supreme Court of the United States

OCTOBER TERM, 1979

FAYMOR DEVELOPMENT CO., INC., PETITIONER

v.

EVELYN M. KING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1178

FAYMOR DEVELOPMENT CO., INC., PETITIONER

v.

EVELYN M. KING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioner contends that the court of appeals erred in affirming a district court order that permanently enjoins the Secretary of Housing and Urban Development from financing or funding a proposed low-income housing project[1] in which petitioner has an interest as developer.

---

[1]Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. 1437(f), authorizes the Secretary to make assistance payments to owners who construct or rehabilitate housing in which some or all of the units are available for occupancy by lower-income families. Standards promulgated by the Secretary to govern project-site selection provide in relevant part (24 C.F.R. 880.112):

(c) The site shall not be located in:

(1) An area of minority concentration unless * * *

1. On July 6, 1978, the Secretary approved petitioner's proposal for the development of a six-story low-income project on Staten Island, New York (the "Tenhill project"). Respondents, the Staten Island Branch of the National Association for the Advancement of Colored People and residents and organizations in the area of the project, commenced this action against the Secretary and petitioner in the United States District Court for the Eastern District of New York, seeking an injunction against the use of federal funds in construction of the project. Respondents alleged that the project would increase minority concentration and upset the existing racial balance in the project area, in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution, the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*), the Housing and Development Act of 1974 (42 U.S.C. 5301 *et seq.*), the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and HUD's site-selection regulations (24 C.F.R. 880.112).

After a trial, the district court permanently enjoined the Secretary from funding the Tenhill project (Pet. App. 36a). The court found, *inter alia*, that selection of the project site had occurred (i) without adequate consideration of minority concentration in the project area, (ii)

(ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in the proportion of minority residents in the area * * *.

(2) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

(d) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

without reference to 1978 census data that had rendered obsolete earlier data (including 1970 census data on which the Secretary had exclusively relied) in its reflection of the racial and ethnic composition of the project area, and (iii) without reference to census data from a census tract adjacent to the project site (Pet. App. 22a-35a). The court of appeals affirmed (Pet. App. 39a-41a).

2. Petitioner contends (Pet. 5-6) that the district court's judgment is incorrect because the court relied primarily on *Karlen* v. *Harris*, 590 F. 2d 39 (2d Cir. 1978), which this Court subsequently reversed in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-184 (Jan. 7, 1980). The court of appeals in *Karlen* prevented the Secretary from financing a low-income housing project because it found that the decision to ~~found~~ FUND the project violated a substantive requirement of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, that the "social environmental impact" of low-income housing concentrations be given weight in agency decision-making. 590 F. 2d at 44. In reversing, this Court held that the Secretary had satisfied her "essentially procedural" duties under NEPA when she considered the environmental consequences of the project-site designation. The court of appeals' error in *Karlen* thus was in prescribing the substantive weight that the agency had to give to those consequences. Slip. op. 4-5.

Although the district court's decision in this case relied in part on the Second Circuit's construction of NEPA in *Karlen* (see Pet. App. 33a-34a and n.32), the court's judgment also rested on independent grounds. The district court held that the Secretary had acted arbitrarily and capriciously in relying exclusively on what the court felt

were outdated census data in determining whether HUD's own site-selection standards concerning racial and economic impact had been satisfied (see Pet. App. 16a-28a). Judicial review of final site-selection decisions under the Administrative Procedure Act (5 U.S.C. 706(2)(A)) is, consistent with this Court's decision in *Karlen* (see slip op. 5).[2]

The difficulty here is that the court of appeals' brief affirmance simply "agree[s]" with "the decision" of the district court to enjoin funding of the project, without revealing whether the affirmance is based solely or exclusively on the construction of NEPA rejected in *Karlen* (Pet. App. 40a-41a). Although an affirmance on the ground that the Secretary misapplied her regulations might have been proper, it may be that the court of appeals' actual ground for decision has been virtually, if not completely, eclipsed by this Court's decision in *Karlen*. Accordingly, the Court may wish to grant the petition, vacate the judgment below, and remand the case for reconsideration in light of this Court's decision in *Karlen*.

Finally, we agree with petitioner (Pet. 11) that the district court should not have enjoined the Tenhill project but should have remanded the proposal to the Secretary for further proceedings (Pet. App. 36a).[3] See *South*

[2]Petitioner erroneously asserts (Pet. 9-10) that the decision below requires the Secretary to evaluate proposed housing projects *ad hoc* in lieu of criteria set out in the Department's site-selection standards. To the contrary, the district court's opinion affirms the validity of the standards set forth in the Department's regulations, 24 C.F.R. 880.112 (Pet. App. 19a).

[3]The judgment did not enjoin petitioner from constructing the Tenhill project but enjoined only the use of federal funds for that purpose (Pet. App. 35a n.33).

Prairie Construction Co. v. *Operating Engineers*, 425 U.S. 800, 805-806 (1976); *FPC* v. *Transcontinental Pipeline Corp.*, 423 U.S. 326, 333 (1976). The Secretary did not seek review of the district court judgment, however, and this issue itself is insufficiently substantial in these circumstances to warrant review by this Court. In the event the Court remands this case to the court of appeals, petitioner may seek reconsideration of this ruling as well.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the court of appeals for reconsideration in light of this Court's decision in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-184 (Jan. 7, 1980).

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

DOJ-1980-03